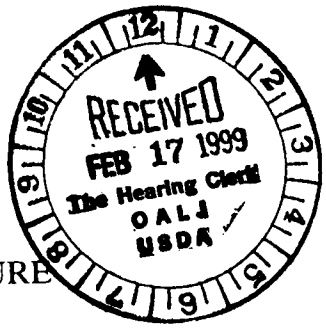

UNITED STATES DEPARTMENT OF AGRICULTURE

BEFORE THE SECRETARY OF AGRICULTURE

In re:	)	PACA Docket No. D-96-0532
	)	
Sunland Packing House Company,	)	
	)	
Respondent	)	**Decision and Order**

The Deputy Director, Fruit and Vegetable Division, Agricultural Marketing Service, United States Department of Agriculture [hereinafter Complainant], instituted this proceeding pursuant to the Perishable Agricultural Commodities Act, 1930, as amended (7 U.S.C. §§ 499a-499s) [hereinafter the PACA]; the regulations promulgated pursuant to the PACA (7 C.F.R. §§ 46.1-.48) [hereinafter the Regulations]; and the Rules of Practice Governing Formal Adjudicatory Proceedings Instituted by the Secretary Under Various Statutes (7 C.F.R. §§ 1.130-.151) [hereinafter the Rules of Practice], by filing a Complaint on July 30, 1996.

The Complaint alleges that: (1) Sunland Packing House Company [hereinafter Respondent] willfully violated section 2(4) and (5) of the PACA (7 U.S.C. § 499b(4), (5)) during the 1994-1995 growing season by misrepresenting 7,718 cartons of Melogolds as Oroblancos and sold and shipped Melogolds as Oroblancos to customers in Japan and the United States (Compl. ¶¶ III, VIII); (2) Respondent willfully violated section 2(4) and (5) of the PACA (7 U.S.C. § 499b(4), (5)) during the 1995-1996 growing season by misrepresenting 2,904 cartons of Melogolds as Oroblancos and sold and shipped

Melogolds as Oroblancos to customers in Japan and the United States (Compl. ¶¶ IV, VIII); and (3) Respondent willfully violated section 2(4) of the PACA (7 U.S.C. § 499b(4)) by failing to truly and correctly account to growers for shipments of Melogolds and Oroblancos (Compl. ¶¶ V-VIII).

Respondent filed Answer and Request for Oral Hearing [hereinafter Answer] on August 26, 1996, denying the material allegations of the Complaint.

Administrative Law Judge Dorothea A. Baker [hereinafter ALJ] presided over a hearing on July 10-11, 14-18, 1997, in Fresno, California. Andrew Y. Stanton, Office of the General Counsel, United States Department of Agriculture, Washington, D.C., represented Complainant. Steven M. McClean, Kane, McClean & Mengshol, Fresno, California, represented Respondent.

On October 15, 1997, Complainant filed Complainant's Proposed Findings of Fact, Conclusions and Order, and on January 26, 1998, Respondent filed Respondent's Objection To Claimant's [sic] Proposed Findings of Fact. On February 6, 1998, Complainant filed Notice of Changes to Transcript Citations in Complainant's Proposed Findings of Fact, Conclusions and Order; and also on February 6, 1998, Complainant filed Complainant's Proposed Findings of Fact, Conclusions and Order with Revised Transcript Citations [hereinafter Complainant's Brief]. On February 13, 1998, Complainant filed Complainant's Reply Brief. On May 4, 1998, Respondent filed Respondent's Reply to Complainant's Reply Brief.

On June 1, 1998, the ALJ issued a Decision and Order [hereinafter Initial Decision and Order] in which the ALJ: (1) concluded that Complainant failed to prove

by a preponderance of the evidence the violations alleged in paragraphs V and VI of the Complaint; (2) stated that Complainant had withdrawn the alleged violation in paragraph VII of the Complaint; (3) concluded that, as a result of negligence, mistake, accident, or inadvertence, Respondent misrepresented Melogolds as Oroblancos, in violation of section 2(5) of the PACA (7 U.S.C. § 499b(5)); and (4) suspended Respondent's PACA license for 15 days (Initial Decision and Order at 47-48, 62, 70).

On July 1, 1998, Complainant appealed to the Judicial Officer; on July 30, 1998, Respondent filed Response to Complainant's Appeal Petition [hereinafter Respondent's Response] and Respondent's Request For Oral Argument; and on July 31, 1998, the Hearing Clerk transmitted the record of the proceeding to the Judicial Officer for decision.

Respondent's request for oral argument before the Judicial Officer, which the Judicial Officer may grant, refuse, or limit (7 C.F.R. § 1.145(d)), is refused because the issues have been fully briefed by the parties; thus, oral argument would appear to serve no useful purpose.

Based upon a careful consideration of the record and pursuant to section 1.145(i) of the Rules of Practice (7 C.F.R. § 1.145(i)), except with respect to the sanction imposed against Respondent by the ALJ, I adopt the Initial Decision and Order as the final Decision and Order. Additional conclusions by the Judicial Officer follow the ALJ's discussion.

Complainant's exhibits are designated by the letters "CX"; Respondent's exhibits are designated by the letters "RX"; and transcript references are designated by "Tr."

PERTINENT STATUTORY AND REGULATORY PROVISIONS

7 U.S.C.:

TITLE 7—AGRICULTURE

. . . .

CHAPTER 20A—PERISHABLE AGRICULTURAL COMMODITIES

. . . .

§ 499b. Unfair conduct

It shall be unlawful in or in connection with any transaction in interstate or foreign commerce:

. . . .

(4) For any commission merchant, dealer, or broker to make, for a fraudulent purpose, any false or misleading statement in connection with any transaction involving any perishable agricultural commodity which is received in interstate or foreign commerce by such commission merchant, or bought or sold, or contracted to be bought, sold, or consigned, in such commerce by such dealer, or the purchase or sale of which in such commerce is negotiated by such broker; or to fail or refuse truly and correctly to account and make full payment promptly in respect of any transaction in any such commodity to the person with whom such transaction is had; or to fail, without reasonable cause, to perform any specification or duty, express or implied, arising out of any undertaking in connection with any such transaction; or to fail to maintain the trust as required under section 499e(c) of this title. However, this paragraph shall not be considered to make the good faith offer, solicitation, payment, or receipt of collateral fees and expenses, in and of itself, unlawful under this chapter.

(5) For any commission merchant, dealer, or broker to misrepresent by word, act, mark, stencil, label, statement, or deed, the character, kind, grade, quality, quantity, size, pack, weight, condition, degree of maturity, or State, country, or region of origin of any perishable agricultural commodity received, shipped, sold, or offered to be sold in interstate or foreign commerce. However, any commission merchant, dealer, or broker who has violated—

(A) any provision of this paragraph may, with the consent of the Secretary, admit the violation or violations; or

(B) any provision of this paragraph relating to a misrepresentation by mark, stencil, or label shall be

permitted by the Secretary to admit the violation or violations if such violation or violations are not repeated or flagrant;

and pay, in the case of a violation under either clause (A) or (B) of this paragraph, a monetary penalty not to exceed $2,000 in lieu of a formal proceeding for the suspension or revocation of license, any payment so made to be deposited into the Treasury of the United States as miscellaneous receipts. A person other than the first licensee handling misbranded perishable agricultural commodities shall not be held liable for a violation of this paragraph by reason of the conduct of another if the person did not have knowledge of the violation or lacked the ability to correct the violation.

§ 499h. Grounds for suspension or revocation of license

(a) Authority of Secretary

Whenever (1) the Secretary determines, as provided in section 499f of this title, that any commission merchant, dealer, or broker has violated any of the provisions of section 499b of this title, or (2) any commission merchant, dealer, or broker has been found guilty in a Federal court of having violated section 499n(b) of this title, the Secretary may publish the facts and circumstances of such violation and/or, by order, suspend the license of such offender for a period not to exceed ninety days, except that, if the violation is flagrant or repeated, the Secretary may, by order, revoke the license of the offender.

. . . .

(e) Alternative civil penalties

In lieu of suspending or revoking a license under this section when the Secretary determines, as provided by section 499f of this title, that a commission merchant, dealer, or broker has violated section 499b of this title or subsection (b) of this section, the Secretary may assess a civil penalty not to exceed $2,000 for each violative transaction or each day the violation continues. In assessing the amount of a penalty under this subsection, the Secretary shall give due consideration to the size of the business, the number of employees, and the seriousness, nature, and amount of the violation. Amounts collected under this subsection shall be deposited in the Treasury of the United States as miscellaneous receipts.

7 U.S.C. §§ 499b(4)-(5), 499h(a), (e) (1994 & Supp. III 1997).

7 C.F.R.:

TITLE 7—AGRICULTURE

. . . .

SUBTITLE B—REGULATIONS OF THE DEPARTMENT OF AGRICULTURE

CHAPTER I—AGRICULTURAL MARKETING SERVICE

. . . .

SUBCHAPTER B—MARKETING OF PERISHABLE AGRICULTURAL COMMODITIES

PART 46—REGULATIONS (OTHER THAN RULES OF PRACTICE) UNDER THE PERISHABLE AGRICULTURAL COMMODITIES ACT, 1930

DEFINITIONS

. . . .

§ 46.2 Definitions.

The terms defined in the first section of the Act shall have the same meaning as stated therein. Unless otherwise defined, the following terms whether used in the regulations, in the Act, or in the trade shall be construed as follows:

. . . .

(z) *Account promptly*, except when otherwise specifically agreed upon by the parties, means rendering to the principal a true and correct accounting:

. . . .

(2) . . . And *Provided further*, That nothing in the regulations in this part shall prohibit cooperative associations from accounting to their members on the basis of seasonal pools or other arrangements provided by their regulations or bylaws. . . .

. . . .

(aa) *Full payment promptly* is the term used in the Act in specifying the period of time for making payment without committing a violation of the Act. . . .

. . . .

Nothing in the regulations in this part shall limit the seller's privilege of shipping under a closed or advise bill of lading or other arrangement requiring cash on delivery unless there has been express prior agreement to the contrary between the parties; or prohibit cooperative associations from settling with their members on the basis of seasonal pools or other arrangements provided by their regulations or bylaws. If there is a dispute concerning a transaction, the foregoing time periods for prompt payment apply only to payment of the undisputed amount.

. . . .

GROWERS' AGENTS AND SHIPPERS

. . . .

§ 46.32 Duties of growers' agents.

(a) *General.* The duties, responsibilities, and extent of the authority of a growers' agent depend on the type of contract made with the growers. Agreements between growers and agents should be reduced to a written contract clearly defining the duties and responsibilities of both parties and the extent of the agent's authority in distributing the produce. When such agreements between the parties are not reduced to written contracts, the agent shall have available a written statement describing the terms and conditions under which he will handle the produce of the grower during the current season and shall mail or deliver this statement to the grower on or before receipt of the first lot. A grower will be considered to have agreed to these terms if, after receiving such statement, he delivers his produce to the agent for handling in the usual manner. In the event an unsolicited lot of produce is accepted by an agent for handling in his usual manner, he shall promptly deliver or mail a copy of such statement to the grower. A copy of this statement, showing the name of the grower and the date the statement was delivered to the grower, shall be retained in the agent's files. An agent who does not have in his files either written contacts or a written statement as required herein is failing to prepare and maintain full and complete records as required by the Act. *Provided*, That regulations or bylaws of cooperative marketing associations may be used in lieu of individual agreements or contracts to determine the methods of accounting and settlement with their grower members. An agent who fails to perform any specification or duty, express or implied, is in violation of the Act and may be held liable for any damages resulting therefrom and for other penalties provided under the Act for such failure.

(b) *Accounting for charges.* A growers' agent whose operations include such services as the planting, harvesting, grading, packing,

furnishing of containers or other supplies, storing, selling or distributing produce for or on behalf of growers shall prepare and maintain complete records on all transactions in sufficient detail as to be readily understood and audited. Agents must be in a position to render to the growers accurate and detailed accountings covering all aspects of their handling of the produce. . . . The agent shall prepare and maintain full and complete records on all details of such distribution to provide supporting evidence for the accounting. If an agent is working under a pool agreement with growers, the accounting shall show how the pool cost and pool sales prices are computed. If the agent and the growers have agreed on a fixed charge to cover the various operations conducted by the agent, actual expenses incurred for these services covered by the agreement are not required to be shown in the accounting. The failure of the agent to render prompt, accurate and detailed accountings in accordance with § 46.2(z) and (aa), is a violation of the Act.

. . . .

MISREPRESENTATION OR MISBRANDING

§ 46.45 Procedure in administering section 2(5) of the Act.

It is a violation of section 2(5) for a commission merchant, dealer or broker to misrepresent by word, act, mark, stencil, label, statement, or deed, the character, kind, grade, quality, quantity, size, pack, weight, condition, degree of maturity, or State, country, or region of origin of any perishable agricultural commodity received, shipped, sold, or offered to be sold in interstate or foreign commerce.

(a) *Violations.* Violations are considered to be serious, very serious, or repeated and/or flagrant, depending upon the circumstances of the misrepresentation.

(1) *Serious violations.* Include the following:

(i) Any lot of a perishable agricultural commodity shown by official inspection to contain scorable defects, off-size, off-count, exceeding the tolerance(s) in an amount up to and including double the tolerance provided in the applicable grades, standards or inspection procedures;

(ii) Any lot of perishable agricultural commodity officially certified as failing to meet the declared weight;

(iii) Any lot of a perishable agricultural commodity in which the State, country, or region of origin of the produce is misrepresented because the lot is made up of containers with various labels or markings that reflect more than one incorrect State, country or region of origin. Example: A lot with containers individually marked to show the origin as Idaho or Maine or Colorado when the produce was grown in Wisconsin; or

(iv) Any other physical act, verbal or written declaration, or record entry that misrepresents a lot of a perishable agricultural commodity to the same extent as the examples listed.

(2) *Very serious violations.* Include the following:

(i) Any lot of a perishable agricultural commodity shown by official inspection to contain scorable defects, off-size, off-count, in excess of double the tolerance(s) provided in the applicable grades, standards or inspection procedures;

(ii) Any lot of a perishable agricultural commodity packed in containers showing a single point of origin, which is other than that in which the produce was grown, such as containers marked "California" when the produced was grown in Arizona;

(iii) Any lot of a perishable agricultural commodity officially certified as having an average net weight more than four percent below the declared weight;

(iv) Multiple sales or shipments of a misrepresented perishable agricultural commodity within a seven day period that can be attributed to one cause; or

(v) Any other physical act, verbal or written declaration, or record entry that misrepresents a lot of a perishable agricultural commodity to the same extent as the examples listed.

(3) *Flagrant violations.* Include, but are not necessarily limited to, the following examples:

(i) Shipment or sale of a lot of a perishable agricultural commodity from shipping point after notification by official inspection that the inspected commodity fails to comply with any marking on the container without first, correcting the misbranding;

(ii) To offer for resale or consignment, a lot of a perishable agricultural commodity that has been officially inspected at destination and found to be misbranded without advising a prospective receiver that the lot is misbranded and that the misbranding must be corrected before resale. When a resale or consignment is finalized, *written* notice must be given that the lot is misbranded and must be corrected before resale; or

(iii) To withhold or fail to disclose known material facts with respect to a misrepresentation or misbranding.

(b) *Evidence.* (1) Evidence concerning a misrepresentation or misbranding includes official certificates of an inspection made by any person authorized by the Department to inspect fruits and vegetables or other public certifiers, and includes investigations and audit findings and any business records, testimony or other evidence bearing on the subject.

7 C.F.R. §§ 46.2(z), (aa), .32(a)-(b), .45(a)-(b)(1) (1996).

CALIFORNIA CODES

Food and Agricultural Code

. . . .

Division 20

PROCESSORS, STORERS, DEALERS, AND DISTRIBUTORS OF AGRICULTURAL PRODUCTS

Chapter 1

NONPROFIT COOPERATIVE ASSOCIATIONS

. . . .

Article 2

GENERAL PROVISIONS

§ 54033. Nonprofit nature of associations

Associations which are organized pursuant to this chapter are "nonprofit," since they are not organized to make profit for themselves, as such, or for their members, as such, but only for their members as producers.

§ 54034. Exemption from conflicting laws

Any provisions of law which are in conflict with this chapter do not apply to any association which is provided for in this chapter.

. . . .

§ 54036. Use of the word "cooperative"

A person, firm, corporation, or association, that is hereafter organized or doing business in this state, may not use the word "cooperative" as part of its corporate name or other business name or title for producers' cooperative marketing activities, unless it has complied with this chapter.

Article 3

PURPOSES

§ 54061. Persons authorized to form association; purposes

Three or more natural persons, a majority of whom are residents of this state, who are engaged in the production of any product, may form an association pursuant to this chapter for the purpose of engaging in any activity in connection with any of the following:

(a) The production, marketing, or selling of the products of its members.

(b) The harvesting, preserving, drying, processing, canning, packing, grading, storing, handling, shipping, or utilization of any product of its members, or the manufacturing or making of the byproducts of any product of its members.

(c) The manufacturing, selling, or supplying to its members of machinery, equipment or supplies.

(d) The financing of the activities which are specified by this section.

(e) Any one or more of the activities which are specified in this section.

Cal. Food & Agric. Code §§ 54033, 54034, 54036, 54061 (West 1986).

CALIFORNIA CODE OF REGULATIONS

Title 3. Food and Agriculture

. . . .

Division 3. Economics

Chapter 1. Fruit and Vegetable Standardization

. . . .

Subchapter 4. Fresh Fruits, Nuts and Vegetables

. . . .

Article 22. Citrus

§ 1430.13. Citrus, Marking Requirements.

. . . [E]very nonconsumer container, except master containers, shall be clearly and conspicuously marked with the following information:

. . . .

(b) Variety Designation.

(1) Oranges, grapefruit, tangerines, or mandarins shall show the name of the variety, if known, or the words "Unknown Variety."

(2) For all varieties of navel oranges, the varietal designation shall be "Navel."

(3) For all varieties of valencia oranges, "Valencia."

(4) For all varieties of white marsh grapefruit, "Marsh White" or "Golden."

(5) For all varieties of pink marsh grapefruit, "Marsh Ruby" or "Marsh Red."

(6) For all varieties of Oroblanco, the varietal designation shall be "Oroblanco" or "Sweetie," provided that only one such designation shall be marked on the container. For all varieties of Melogold, the varietal designation shall be "Melogold". For the purpose of this article, the common name or identity of Oroblancos and Melogolds, and similar type hybrids resulting from a cross between pummelo and grapefruit shall be "grapefruit hybrid".[1]

Cal. Code Regs. tit. 3, § 1430.13(b) (1998).

ADMINISTRATIVE LAW JUDGE'S INITIAL DECISION AND ORDER (AS RESTATED)

Findings of Fact

1. Respondent's address is 26454 Avenue 128, Porterville, California 93257-9718 (Tr. 19, 875; CX 1 at 1). Porterville is located in Tulare County, California (Tr. 856-57).

2. Pursuant to the licensing provisions of the PACA, License No. 184369 was issued to Respondent (CX 1). At the time of the hearing, this license had been renewed annually and was next subject to renewal on or before December 29, 1997 (CX 1 at 13).

[[1]Section 1430.13(b)(1)-(5) was in effect at all times material to this proceeding. Section 1430.13(b) was amended, effective January 11, 1997, after the violations alleged in the Complaint, to add new paragraph (b)(6) (RX 126).]

3. Respondent is an agricultural cooperative association, formed under California law, that is composed of approximately 80 growers, which number varies (Tr. 19, 876). Respondent is a packer and marketer of the agricultural products of its members (RX 104 at 1). Respondent's current president is Harrison Smith, who is also one of the directors (Tr. 874; CX 1 at 14). Harrison Smith's grandfather was one of the founders of Respondent in 1916 (Tr. 19, 874-75).

4. Respondent has issued articles of incorporation and bylaws in conformity with the laws of California (Tr. 19; RX 104 at 1).

5. Respondent's growers produce several kinds of citrus fruit (Tr. 900). The fruit involved in this proceeding has been described variously as "hybrid grapefruit," "Oroblanco," or "Melogold" (CX 58; RX 100). The California Code of Regulations was amended, effective January 11, 1997, to require that varieties of Oroblanco be designated as "Oroblanco" or "Sweetie," to require that varieties of Melogold be designated as "Melogold," and to provide that the common name or identity of Oroblancos and Melogolds, and similar type hybrids, resulting from a cross between pummelo and grapefruit, is "grapefruit hybrid." (RX 126).[2]

6. Respondent is associated with a marketing cooperative, Sunkist Growers, Inc. [hereinafter Sunkist], and each grower that becomes a member of Respondent becomes a member of Sunkist (Tr. 903; RX 107). Sunkist is a cooperative of citrus growers and markets citrus for members in Arizona and California (Tr. 1000-01).

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[2]In view of the numerous references to "hybrid grapefruit" made both in the transcript and in Complainant's and Respondent's filings, the nomenclature of "hybrid grapefruit" is utilized in this Decision and Order.

Sunkist is the seller of hybrid grapefruit, as well as other produce, packed by Respondent (RX 110 at 2). Oroblancos and Melogolds are sold in domestic and Canadian markets, although the primary market is Japan (CX 24 at 61-67, 76-267; Tr. 1014). Sunkist, not Respondent, actually ships and sells the produce (Tr. 1038-39; RX 119 at 7 n.A1). A typical sale may involve the Tulare County Fruit Exchange, which is a local produce exchange which passes on Sunkist's requests for produce to those in the locality which have the produce ready to go to market (Tr. 1145-46). Sunkist allocates the amount of fruit to be sold and then arranges for delivery from its packers, such as Respondent, which Sunkist then exports (Tr. 1038-40). Respondent supplies fruit with which Sunkist fills the orders it has received (Tr. 1038-40). Sunkist would receive the proceeds of the sale and would deduct its assessments and other charges prior to the receipt by Respondent of the proceeds for the sale of the produce. If the Tulare County Fruit Exchange were involved, it would also deduct assessments or fees prior to the receipt by Respondent of the proceeds from the sale of the produce. (Tr. 1145-47.)

7. Generally, Respondent's growers executed an application for membership on a form. By executing the membership application, each member agreed to, and was bound by, Respondent's articles of incorporation and bylaws. (RX 103.) Under its bylaws, the delivery of fruit to Respondent for packing could result in the person making delivery becoming a member of Respondent with the same rights and duties as those members who execute a written application for membership (RX 104 at 6-7: § 2.4).

8. Respondent is owned by its members and it is "nonprofit," that is, any profits are returned to the members (Tr. 19-20; RX 104). The expenses, charges, and

losses are to be paid by the members and may be assessed against the members according to Respondent's bylaws (RX 104 at 14-15, 21: §§ 6.2, 9.5). In contrast, a proprietary packinghouse is for profit and is owned by its principals, not the growers whose fruit is packed by the proprietary packinghouse. All profits from packing and marketing the fruit, and the burden of any loss, will fall upon the owners of the proprietary packinghouse, not the growers. Article sixth of Respondent's amended articles of incorporation provides:

> SIXTH: To provide funds for corporate purposes of Association, revolving funds and other allocated reserves may be established. Such revolving fund for allocated reserve credits shall not be deemed to evidence, create or establish any present property rights or interests, as such terms are herein used, but such credits shall be deemed to evidence an indebtedness of Association payable only as provided in the by-laws. In the event the membership of any member shall terminate for any reason whatsoever, such member shall not thereupon become entitled to demand or receive any interest in the property and assets of Association as herein defined, but shall be entitled only to receive payment of his revolving fund credits and his interest, if any, in other allocated reserves as and when same would have been paid had he remained a member.

RX 104 at 2. The amended articles of incorporation also sets forth Respondent's bylaws which were in effect in the 1994-1995 and 1995-1996 seasons (RX 104 at 5-25; Tr. 877).

9. Pursuant to the decision of its board of directors, Respondent generally assesses a packing charge on the fresh fruit at the time it is first packed. Fruit which is not suitable for packing as fresh fruit is either culled as rots or sent to juice (which can be after packing) to a by-products plant (Tr. 887).

10. Pursuant to the decision of the board of directors, Respondent assessed a contingency charge of 8 cents for each carton of hybrid grapefruit packed in the 1994-1995 season and 10 cents for each carton of hybrid grapefruit packed in the 1995-1996

season. Although Respondent advised its members of this contingency charge and it had been approved by Respondent's board of directors, Complainant alleged that Respondent failed to account to its members for this contingency charge because there was not an agreement, in writing, which was given to the members prior to the season, expressly setting forth this charge. Although neither Respondent's articles of incorporation nor Respondent's bylaws reference a contingency charge to be imposed upon its members, the approval and ratification of the contingency charge each year by the board of directors and members was in accordance with the authority which the board of directors possesses pursuant to Respondent's bylaws.

11. Complainant also contends that only packing charges on cartons sold, as reflected by Sunkist's records, were in accordance with the PACA, notwithstanding the fact that Respondent did incur the cost to pack the fruit. In other words, despite Respondent's long-standing practice and the yearly approval by the board of directors and ratification by the members of that practice, Complainant would disallow Respondent's packing charge on certain cartons of fruit, which were packed, but not sold. Since Respondent incurred packing costs and there was nothing illegal about the practice of charging for packing, there is no valid basis for Complainant's contention that Respondent's packing charge for fruit not sold violated the PACA.

12. All actions of the board of directors in establishing and assessing charges to the members, as well as paying out juice proceeds, were ratified by Respondent's members for the 1994-1995 and 1995-1996 seasons at the annual meetings.

13. Respondent's fiscal year ends October 31st of each year. Respondent's expenses, during the period in question, exceeded its revenues. (RX 119, RX 120.) Under Respondent's bylaws, and, in particular, sections 6.1, 6.2, and 8.9, and article IX, the board of directors has the power, in its sole discretion, to assess members for Respondent's operating expenses and losses and to credit any losses against the revolving fund or any other reserve account.

14. Respondent properly made assessments or deductions to meet "the charges and expenses of the association," as provided in the bylaws, and also, pursuant to article IX of the bylaws, properly added the assessments or deductions to the revolving fund and/or other allocated reserve credits. Article IX of the bylaws provides that the method, amount, manner, and time of assessments or deduction for "charges and expenses of the association" shall be determined in the discretion of the board of directors. Accordingly, the bylaws permit assessment of a contingency charge by Respondent's board of directors in its sole discretion. Respondent's articles of incorporation and bylaws are in conformity with State of California law. Complainant does not contend that Respondent's bylaws or articles of incorporation are unlawful.

15. Respondent did not fail to "account promptly" and make "full payment promptly" to its members. As a cooperative, Respondent was only required to account to its members and make payments to the members as required by its bylaws. Complainant presented no evidence that Respondent failed to comply with its bylaws and to account to its members, as required by the bylaws; Respondent demonstrated through a certified public accountant, a Sunkist auditor, and its own bookkeepers, that it did account to its

members, as required by the bylaws. Respondent fully and correctly accounted to its members for all sums due them. Ms. Anthony, the Sunkist auditor, also established that Respondent's contingency charge is a charge customarily taken by other Sunkist packinghouses.

16. The board of directors established packing and contingency charges pursuant to sections 6.1(d), 6.2, 8.8, and 8.9, and article IX of the bylaws (RX 104) and acted in conformity with those provisions of the bylaws. The packing and contingency charges were necessary and usual business expenses. Respondent's deduction of packing and contingency charges from funds it remitted to its members was not a violation of the PACA.

17. Respondent is empowered to assess its members for the costs of continuing in business. In the instant case, even if Respondent "overcharged" its members or "failed to account properly" because of its assessment of charges, any such over assessment not necessary to pay the expenses and continue the operations of Respondent would be returned to the members. (RX 104 at 14-15, 18, 20-22: §§ 6.1(d), 6.2, and 8.9, and article IX.) The evidence supports Respondent's contention that there were no such "overcharges," as it appropriately assessed the charges pursuant to the discretion given it under the bylaws.

18. Paragraph VII of the Complaint alleges that Respondent failed to account, truly and correctly, to 20 of its members with respect to Melogolds and Oroblancos processed for juice, in willful violation of section 2(4) of the PACA (7 U.S.C. § 499b(4)). The evidence shows that Respondent did account, truly and correctly, to 20 members

with respect to Melogolds and Oroblancos processed for juice. Accordingly, paragraph VII of the Complaint is dismissed.

19. Paragraphs V and VI of the Complaint allege failure to account, truly and correctly, for $4,439.29 and $14,299.12, respectively, in willful violation of section 2(4) of the PACA (7 U.S.C. § 499b(4)). These figures were subsequently amended. The evidence does not show that Respondent failed to truly and correctly account to its members for $4,269.16 (as amended) for the 1994-1995 season and $14,028.23 (as amended) for the 1995-1996 season. Accordingly, paragraphs V and VI of the Complaint are dismissed.

20. Respondent did not violate section 2(4) of the PACA (7 U.S.C. § 499b(4)) in its accounting to members for the proceeds from the sale of hybrid grapefruit, or in any other manner.

21. As a result of cross-breeding, hybrid grapefruit, known as Oroblancos and Melogolds, were developed (Tr. 78-81, 98-99; CX 58; RX 100). Oroblancos and Melogolds are a cross between a pummelo and a grapefruit, and both come from a common source, as a result of hybridization (Tr. 35, 38, 78-81, 98-99; CX 58; RX 100). Melogolds and Oroblancos are substantially similar, but there are differences between them (Tr. 38-50, 1363; CX 58). Melogolds and Oroblancos cannot be shipped as "grapefruit" because of insufficient yellow color (Tr. 860, 862, 864).

22. The differences between Melogold and Oroblanco from mature trees are more easily discerned than the differences between Melogold and Oroblanco from immature trees (Tr. 1352-67, 1376-78). The shape of Melogold is comparable to

Oroblanco, but Melogold has a slight tendency for more stem-end taper than Oroblanco (Tr. 45, 54, 1356-58). Oroblanco tends to be smaller than Melogold (Tr. 45, 54). Under ideal conditions, and, from mature trees, the differences relate to Melogold being more pummelo-like than Oroblanco (Tr. 47, 1376-77). The average peel thickness of Melogold, as a percentage of fruit diameter, is thinner than Oroblanco; the interior color and texture of Melogold are the same as in Oroblanco; the juice percentage of Melogold is slightly higher than Oroblanco; and Melogold may have a slight bitterness, particularly early and late in the harvest season (Tr. 46-48, 50, 54; RX 100 at 3). To the untrained eye, and even as to those more knowledgeable, there is a substantial likeness between Melogolds and Oroblancos (Tr. 61-66, 1362-63).

23. The testimony of a number of witnesses establishes that they did not agree as to the means of distinguishing Melogolds from Oroblancos--there was the "taste" test; thickness of peel; color and texture; interior color; juice test; and appearance (Mr. Josephson: Tr. 791-93; Mr. Roger Smith: Tr. 1352-68). Although "experts," such as the one grower witness of Complainant (Mr. Josephson: Tr. 784, 791-93, 807-08), and those experienced in the area of distinguishing between Oroblancos and Melogolds (Mr. Roger Smith: Tr. 1358, 1380-81) would have less tendency than others to confuse Melogolds and Oroblancos, this reduced tendency to confuse Melogolds and Oroblancos would not necessarily apply to a packinghouse manager or worker who was confronted with fruit from immature trees (Tr. 1352-68, 1376-78). The trees from which fruit was packed in the instant case were immature trees (Tr. 811, 1353-67, 1380-81).

24. In the 1994-1995 and 1995-1996 seasons, neither the State of California nor the United States Department of Agriculture [hereinafter USDA] had established identity standards or required varietal designations for Oroblancos and Melogolds (Tr. 858-69, 944). Identity standards describing and establishing the varieties of Oroblanco and Melogold became effective in January 1997 (RX 126). Prior to the 1994-1995 season, Respondent received no advice or instructions from any governmental agency as to how to label or represent the hybrid grapefruit, despite Respondent's request for advice (Tr. 944). The advice received from county inspector Gould was that Melogolds and Oroblancos could not be identified or labeled as grapefruit because they did not have the yellow color required for grapefruit (Tr. 860, 864, 944). County inspector Gould also advised Respondent there were no identity standards for Melogolds or Oroblancos (Tr. 859-62, 864-65, 944).

25. Sunkist began shipping more than pallet-sized amounts of Oroblancos and Melogolds to Japan in the 1992-1993 season (Tr. 1005-06). Sunkist began shipping significant quantities of hybrid grapefruit to Japan during the 1993-1994 season, when it shipped approximately 30,000 cartons (Tr. 1006-07). In the 1994-1995 season, Sunkist shipped to Japan approximately 41,000 cartons of Oroblancos and 17,000 cartons of Melogolds (Tr. 1007). In the 1995-1996 season, Sunkist shipped to Japan 52,212 cartons of Oroblancos and no cartons of Melogolds (Tr. 1007; RX 109). Sunkist is probably the biggest United States exporter of hybrid grapefruit to Japan (Tr. 1037).

26. Under patent rights obtained by the University of California (Tr. 50; CX 58; RX 100), the Israelis started growing Oroblancos, which they called "Sweeties." In the 1992-1993 season, growers in Israel began shipping to Japan significant quantities of

Sweeties. The volume of Israeli exports of Sweeties to Japan increased substantially since the 1992-1993 season. (Tr. 1006.) The Israelis shipped approximately 544,944 cartons during the 1993-1994 season, 980,494 cartons during the 1994-1995 season, 1,268,408 cartons during the 1995-1996 season, and 1,369,796 cartons during the 1996-1997 season (RX 108). Although the record is not explicit, the Israeli Sweeties may have arrived in Japan as early as November 1995, in the 1995-1996 season, although there is some indication that they did not arrive until December 1995 (Tr. 950; RX 108).

27. In the 1995-1996 season, Japanese customers developed a preference for Israeli Sweeties to hybrid grapefruit grown elsewhere (Tr. 1009, 1014, 1035). The Japanese prefer fruit with a dark green color, a hard texture, and a sweet taste (Tr. 1009). In order for growers in Tulare County to ship hybrid grapefruit containing the characteristics desired by the Japanese, harvesting and shipment must take place either in late October or early November (Tr. 1008-09).

28. During the 1994-1995 season, Sunkist sent Respondent orders for quantities of hybrid grapefruit sought by Japanese importers (Tr. 949-50). Sunkist made the determination as to allocation and delivery of the fruit to specific buyers (Tr. 1038-40). Respondent's fruit was delivered to Sunkist for loading onto two ships in the 1994-1995 season: The American Fuji and the Swan Stream (CX 23 at 3, 5). In the 1995-1996 season, Respondent delivered its fruit to Sunkist for shipment to Japan on three ships: The Ohyoh, sailing date October 20, 1995 (CX 23 at 12); Spring Delight, sailing date October 27, 1995 (CX 23 at 15); and Columbus Canada, sailing date November 3, 1995 (CX 23 at 19).

29. Franklin Carl Arcure is currently the manager and the secretary/treasurer of Respondent and has been the manager of Respondent for the past 12 years, including the 1994-1995 and 1995-1996 seasons (Tr. 937). As the manager, Mr. Arcure has responsibility to oversee the entire packinghouse (Tr. 1491). This responsibility includes oversight of the field men, the packinghouse foreman, all fruit receiving, packing, grading, and sales, and member relations (Tr. 946). During the 1995-1996 season, Mr. Arcure also acted as Respondent's field man (Tr. 939-40). Mr. Arcure is also a member of Respondent and on its board of directors (Tr. 964).

30. During the 1994-1995 and 1995-1996 seasons, once the hybrid grapefruit was picked, Respondent transported it from the field to the packinghouse in bins (Tr. 140-41, 943; CX 5). Respondent's receiver made out receiving tags for the bins indicating the grower's name, the variety, and how many bins Respondent received (Tr. 142, 1430). When the fruit went through the packing line, Respondent's employees noted the number of cartons of various sizes packed on a document issued by Respondent, called a "grower carton tally" (Tr. 142; CX 5 at 3, CX 6 at 3, CX 10 at 3-13, CX 11 at 3). This information was then given to Respondent's secretary (Tr. 116-17).

31. The 1994-1995 season was the first time that Respondent had received Oroblancos and Melogolds in quantity, and Respondent did not know how to label, mark, represent, or identify the fruit (Tr. 858-65, 944; RX 126). Mr. Arcure and the board of directors regarded Melogolds and Oroblancos as the same, and they were treated as a single pool (Tr. 1138-40, 1143).

32. At times, Respondent found it necessary to repack hybrid grapefruit that had already been packed in cartons because some of the fruit had gone bad (Tr. 155-56, 980-81). On those occasions, in order to make the cartons saleable, Respondent removed the bad fruit and repacked the cartons (Tr. 156, 981). When this occurred, Respondent prepared repack slips, reflecting the repacking (Tr. 155-57). Respondent also prepared a repack summary sheet, reflecting the number of cartons repacked, the number of cartons left after repacking, and the number of cartons dumped (CX 8 at 1, CX 16 at 1).

33. For the 1994-1995 season, according to its own records, Respondent had 711 cartons of Oroblancos available for sale (788 cartons packed, less 77 cartons lost on repacking) (CX 8 at 1) and 11,253 cartons of Melogolds available for sale (11,308 cartons packed, less 55 cartons lost on repacking) (CX 16 at 1).

34. On the basis of records generated and produced by Sunkist and original source documents (CX 9, CX 17), Respondent maintained in its records (but did not generate) shipment summary reports reflecting Sunkist's disposition of Oroblancos and Melogolds during the 1994-1995 season (Tr. 165-68). Information contained in the reports included the name of the buyer, the destination, the assignment number which Sunkist gave to the order, the exchange number, the ship date, and the quantity involved (Tr. 168-72).

35. Sunkist maintained a payment register covering the 1994-1995 and 1995-1996 seasons, indicating how much was paid by the buyers of Respondent's fruit, including Respondent's Oroblancos and Melogolds, the deductions made by Sunkist and

the Tulare County Fruit Exchange, and the net payment to Respondent (Tr. 123-24, 183-87, 277-78; CX 20, CX 60).

36. All shipment summary reports were prepared by Sunkist which prepared all the sales documents concerning the sales of Oroblancos and Melogolds during the 1994-1995 season, and Respondent had copies of some of these records (Tr. 188-212, 225-53; CX 21, CX 23, CX 24).

37. During the 1994-1995 season, Respondent made some sales of Oroblancos and Melogolds through local cash sales, rather than in response to orders from Sunkist (Tr. 237-48; CX 22A).

38. During the 1994-1995 season, according to Respondent's records and the calculations made by Complainant, Respondent caused to be sold 8,429 cartons represented as Oroblancos, 7,718 more cartons of Oroblancos than it had available for sale, and 3,486 cartons of Melogolds (CX 18, CX 19A; Tr. 611-21, 636).

39. During the 1994-1995 season, Respondent accounted to its growers of Oroblancos and Melogolds by combining all the hybrid grapefruit into one pool (Tr. 258-60; CX 25). Respondent sent each of its Oroblanco and Melogold growers a pool statement for combined pool numbers 582 and 583, reflecting the disposition of each grower's product in the combined pool (Tr. 914; CX 25). Reference was made on the pool statements to "Mello Gold/Oro Blanco Pool" (CX 25 at 1). Thus, I have some doubt as to the exact number of cartons of Melogolds and Oroblancos that Respondent had available for sale during the 1994-1995 season, because the fruit was treated as the same variety without need to distinguish.

40. In calculating what should be remitted to its members for the 1994-1995 season, Respondent deducted a packing charge of $2.85 for each carton packed, even if some of the cartons were later lost through repacking (RX 110 at 4). Respondent also deducted a contingency charge of 8 cents for each carton packed (Tr. 1259).

41. During the 1995-1996 season, Respondent differentiated between Melogolds and Oroblancos and accounted to its growers of hybrid grapefruit by using separate pools for Oroblancos and for Melogolds (Tr. 315-16, 326-28; CX 42A, CX 43). Respondent also had a late season Melogold pool (Tr. 357-59; CX 51). Respondent sent each of its Oroblanco and Melogold growers a pool statement reflecting the disposition of each grower's products in either the Oroblanco pool or the Melogold pool (Tr. 330).

42. During the 1995-1996 season, Respondent received Oroblancos from 13 of its members (CX 26-CX 42). Respondent's records indicate that a total of 17,049 cartons were packed, 8,842 cartons went to juice, and 23 cartons were culls (CX 42A at 1).

43. During the 1995-1996 season, Respondent received Melogolds in two pools (Finding of Fact 41). The main pool contained Melogolds received from 10 of Respondent's members (CX 44A at 2-11). Respondent's records, as set forth in Complainant's calculations, indicate that a total of 10,001 cartons were packed, 20,652 cartons went to juice, and 494 cartons were culls (CX 44A at 1). The late season pool contained Melogolds received from only one member, Hal Campbell Revocable Living Trust (CX 51 at 2). Respondent's records indicate that a total of 299 cartons were packed, 2,101 cartons went to juice, and 6 cartons were culls (CX 51 at 1).

44. According to Complainant's calculations, the number of cartons of Melogolds which Respondent packed, sent to juice, or considered culls in the 1995-1996 season included, from Hillcroft Groves, 783 cartons packed, 410 cartons to juice, and 6 cartons considered culls (CX 44A at 5), and from Caliente Farms, 2,348 cartons packed, 2001 cartons to juice, and 13 cartons considered culls (CX 44A at 3).

45. For the 1995-1996 season, Respondent had available, as fresh fruit for sale, 17,049 cartons of Oroblancos and 10,300 cartons of Melogolds (CX 42A at 1, CX 44A at 1; RX 110 at 14).

46. In calculating what should be remitted to the members for the 1995-1996 season, Respondent deducted a packing charge of $3 per carton on all cartons of Oroblancos packed, even if some of the cartons were later lost through repacking (RX 110 at 14). Respondent did not charge its members a packing charge on any of the cartons of Melogolds that went to juice during the 1995-1996 season, even though some of the fruit was packed in cartons before it was decided that the fruit was going to go to juice (Tr. 1474-76, 1531-32; CX 63 at 1). Respondent also deducted a contingency charge of 10 cents for each carton packed (Tr. 1314-16). These charges were consistent with a decision by the board of directors which determined to assess a packing charge only on cartons of Melogolds actually purchased during the 1995-1996 season (Tr. 1532). The board of directors made this decision because Respondent had packed Melogolds anticipating a larger shipment of fruit into Japan (Tr. 1532). However, due to the ability of the Israelis to cold treat their Sweeties in transit, tremendous volumes of Sweeties

arrived in Japan earlier than anticipated, limiting the market for Melogolds (Tr. 1013, 1022-25, 1532).

47. Respondent delivered its fruit to Sunkist at Port Hueneme, which sold the fruit and remitted the net proceeds to Respondent (Tr. 1038-44). Respondent maintained internal records concerning its pool accounting (Tr. 1067-78; RX 110).

48. During the 1995-1996 season, Respondent made some sales of Oroblancos and Melogolds through local cash sales, rather than in response to orders from Sunkist (Tr. 621-29).

49. During the 1995-1996 season, Respondent, through its sales agent, Sunkist, sold 19,953 cartons represented as Oroblancos, 2,904 more cartons of Oroblancos than Respondent had available for sale (Tr. 643-44, 1413-14, 1429-32; CX 45, CX 46 at 3). Upon inspection of the fruit, the county inspector, Mr. Milner, determined that Respondent packed Melogolds from Hillcroft Groves and Caliente Farms in cartons labeled Oroblancos, and the labels were changed, as he requested, before the Melogolds were delivered to Sunkist (Tr. 1395-1401, 1413-21, 1433-34).

50. Although the California Department of Food and Agriculture did not require varietal designation of Oroblancos and Melogolds during the 1994-1995 and 1995-1996 seasons (Finding of Fact 5), nevertheless, Sunkist (Tr. 1009-16), the Japanese purchasers (Tr. 1008-10; RX 109), and the county inspector (Tr. 1396-97) made a distinction between Melogolds and Oroblancos, particularly with respect to the 1995-1996 season, in which no Melogolds were shipped to Japan (RX 109). Sunkist's orders were for Oroblancos, and Respondent filled some of those orders with Melogolds. This

finding is premised upon Respondent's own records, and Respondent has not refuted this finding.

51. Based upon the best evidence available, and without substantial evidence to rebut this evidence, I find that Sunkist, the sales agent of Respondent, during the 1994-1995 and 1995-1996 seasons, gave Respondent orders for Oroblancos, some of which orders Respondent filled with Melogolds (Findings of Fact 25, 38, and 49). Thus, Respondent misrepresented Melogolds as Oroblancos. At most, the number of cartons which Respondent misrepresented were 7,718 cartons in the 1994-1995 season and 2,904 in the 1995-1996 season, for a total of 10,622 cartons. However, because Melogolds and Oroblancos were treated as one pool in the 1994-1995 season, the precise number of cartons of Melogolds that were misrepresented as Oroblancos is not ascertainable.

52. During its long history of operation since 1916 (Tr. 19, 874-75), Respondent has had no prior violations of the PACA.

53. Respondent did not receive any complaints from the Japanese purchasers or from Sunkist with respect to the variety of fruit shipped during the 1994-1995 and 1995-1996 seasons (Tr. 962, 1031-32, 1465-66).

54. The evidence does not show that Respondent's misrepresentation of Melogolds as Oroblancos was for a fraudulent purpose, but rather the result of inadvertence, carelessness, or negligence on the part of Respondent's employees. There is a similarity of appearance between Melogolds and Oroblancos, especially when the fruit is from immature trees and one variety of fruit could be mistaken for the other, particularly by one not schooled in the differences (Tr. 61-66, 1352-67); the California

Department of Food and Agriculture did not require varietal designation of Oroblancos and Melogolds during the two seasons involved in this proceeding (RX 126); a purchase representative from Japan toured the Oroblanco and Melogold groves and did not seem to require differentiation (Tr. 942-43, 947-49, 953-54); and errors were committed as to which groves were being picked and packed (Tr. 1395-1413).

55. Respondent did not make, for fraudulent purpose, any false or misleading statement in connection with any transaction involving any perishable agricultural commodity which was received in interstate or foreign commerce, in violation of section 2(4) of the PACA (7 U.S.C. § 499b(4)).

56. As a result of inadvertence, carelessness, or negligence, Respondent misrepresented approximately 10,622 cartons of Melogolds to be Oroblancos, in violation of section 2(5) of the PACA (7 U.S.C. § 499b(5)).

57. However, as Respondent intentionally committed prohibited acts, irrespective of evil intent or erroneous advice, and acted with careless disregard of statutory requirements, Respondent's violations of section 2(5) of the PACA were willful, within the meaning of the Administrative Procedure Act (5 U.S.C. § 558(c)), and under USDA precedents.

Conclusions of Law

1. The Secretary of Agriculture has jurisdiction in this matter.

2. Respondent willfully and repeatedly misrepresented, by word or statement, the character or kind of a perishable agricultural commodity received, shipped, sold, or

offered to be sold in interstate or foreign commerce, in violation of section 2(5) of the PACA (7 U.S.C. § 499b(5)).

Discussion

The proponent of an order has the burden of proof in proceedings conducted under the Administrative Procedure Act (5 U.S.C. § 556(d)), and the standard of proof by which the burden of persuasion is met is the preponderance of the evidence standard. *Herman & MacLean v. Huddleston*, 459 U.S. 375, 387-92 (1983); *Steadman v. SEC*, 450 U.S. 91, 92-104 (1981). Quantitatively, Complainant need only show a scintilla more than 50 percent of the evidence to prevail under the preponderance standard. Put another way, Complainant need only show that Complainant's version of the facts is more likely than not correct. I find that Complainant has not met the burden of proof by a preponderance of the evidence with respect to allegations in paragraphs V, VI, and VII of the Complaint.

Respondent's amended articles of incorporation (RX 104 at 1-4) and its bylaws (RX 104 at 5-25) reflect the rules which govern the rights and duties of Respondent and its members. Under its bylaws, the delivery of fruit to Respondent for packing could result in the person making delivery becoming a member of Respondent with the same rights and duties as those members who execute a written application for membership (RX 104 at 6-7: § 2.4).

Also set forth in the bylaws are provisions relating to the election of directors (RX 104 at 11: § 5.2), including an enumeration of their general powers (RX 104 at 13-14: § 6.1). The bylaws provide "all corporate powers shall be exercised by or under the

authority of, and the business and affairs of Association shall be controlled by, the board of directors" (RX 104 at 13: § 6.1). The board of directors' powers included the capacity to procure for, and furnish to, members such equipment and supplies and to render such services, as the board of directors might determine to be appropriate, for or in the production of fruit by members and the marketing of such fruit (RX 104 at 14: § 6.1(d)). The bylaws provide that tentative charges for such equipment, supplies, and services are to be assessed and collected in such amount and at such time as the board of directors may determine (RX 104 at 14: § 6.1(d)). Moreover, "[a]ny amount by which the total of such charges in any fiscal year may exceed cost, as determined by the board, shall be refunded ratably on a patronage basis, as of the close of the fiscal year, in such manner and at such time as the board may determine" (RX 104 at 14: § 6.1(d)).

Sections 6.2 and 8.9 of Respondent's bylaws provide that the method, amount, manner, and time of assessment or deduction shall be fixed and determined from time to time by the board of directors and that there was an obligation to return the net proceeds to the members after deducting all charges and operating expenses (RX 104 at 14-15: § 6.2). Such proceeds were to be returned to the members furnishing the fruit for marketing on the basis of the quantity or value of fruit furnished (RX 104 at 18: § 8.9).

In the instant case, the evidence shows that Respondent sustained a loss in the operative period, so no refund was due. Accordingly, the board of directors was authorized to assess a contingency charge, packing charges, and/or other charges in an amount which was in the board's discretion. Under California law and the Regulations, these charges were lawful and did not violate the Regulations concerning the duty to

account to growers. Article IX of Respondent's bylaws provides for the creation of a revolving fund and determinations with respect to the additions to the revolving fund, as well as the nature of revolving fund credits. The entire operation of the revolving fund, as more specifically set forth in the bylaws, was in the sole discretion of the board of directors. Article IX of the bylaws also indicates that there was to be no segregation of the revolving fund and that in the event Respondent sustained losses, such losses could be charged against current operating expenses, the revolving fund, or other allocated reserve credits.

Three reliable and very credible witnesses testified with respect to Respondent's financial operations and the maintenance of its books and records. Admittedly, they were unable to determine how Complainant arrived at its allegations that Respondent had not been remitting proper amounts to its members. Nevertheless, their testimony, combined with documentary evidence, such as RX 110 and RX 111, clearly establishes that there was nothing wrong with Respondent's records and that such records accurately and correctly reflected (except for two minor instances) the amounts of fruit received, the number of cartons shipped, and the disposition of the fruit that was not shipped. Although Sunkist could spot-check Respondent's records at any time, Respondent requested that Sunkist audit Respondent's books. This audit was conducted by Winnie Jo Anthony, who has been employed by Sunkist for 9 years and who, prior to that, worked for 14 years for the Lemon Administrative Committee. She was office manager, did all of the accounting, and was in charge of the Compliance Department, including fruit accountability and the auditing of records of the packinghouses, to assure

that they were in compliance with regulatory requirements. She is field manager now, has two people working for her, and performs all of the packinghouse duties. She still performs field audits. (Tr. 1064-68.)

Ms. Anthony's audit report evidences that Respondent's books and records balance with those of Sunkist, with the exception of two minor bookkeeping errors, which are not of significance in this proceeding (RX 110). However, this report was maintained as a confidential document of Sunkist, was not given to Respondent, and was not available to Respondent until a *subpoena duces tecum* was issued in this proceeding. Accordingly, RX 110 first became available to Respondent at the hearing. During the course of her testimony, Ms. Anthony commented on Respondent's contingency fund, which was utilized principally to preclude back billings to Respondent's members and was not considered unusual by Ms. Anthony. Her testimony corroborated the testimony of other witnesses that the contingency fund was a fund available for disbursement to meet unanticipated expenses. If it was not utilized, the proceeds ultimately would be returned to Respondent's members. Ms. Anthony found absolutely no lack of reporting with respect to the return of receipts to Respondent's members.

Also corroborating the accuracy of the business operations, as reflected in Respondent's records, was Virginia Hall who was Respondent's bookkeeper and manager and who has worked for Respondent for more than 15 years (Tr. 1231-32).

Ms. Hall's testimony descriptively sets forth the operations of Respondent's packinghouse, which operations do not involve the steady flow and disposition of inventory. Ms. Hall indicated, as did the testimony of other witnesses, that Respondent

sold all of its fruit for the 1994-1995 season. However, for the 1995-1996 season, Respondent packed all of its fruit, but did not sell all of its fruit. It was estimated that 75 percent of the fruit which had been packed as Oroblancos were subsequently sent to juice. Thus, there was a large difference between the number of cartons packed and the number of cartons sold. Accordingly, packing charges during the 1995-1996 season were greater than packing charges for the 1994-1995 season because so many cartons had been packed prior to the fruit going to juice. Ms. Hall indicated that for the 1993-1994 season amounts were returned to Respondent's members and amounts had been returned to Respondent's members since then.

Mr. Paul Klippenstein, a certified public accountant licensed by the State of California, testified as to the accuracy of Respondent's books and records and correct procedures employed by Respondent with respect to its books and records. He testified that he had done work for Respondent for the last 5 years. He reviewed and audited Respondent's books and records and compiled monthly statements from the books and records. Mr. Klippenstein testified that his review of Respondent's books and records revealed proper accounting for all funds, that there was no underreporting of funds to Respondent's members, and that the books and records reflected Respondent's operations, including the maintenance of a contingency fund. Mr. Klippenstein testified that the contingency fund is necessary to prevent charge-backs to Respondent's members because Sunkist had an assessment which it could charge-back and the contingency fund is a vehicle to meet any additional charges made by Sunkist.

Complainant's allegations that Respondent withheld unreported amounts from its members and that there was lacking a specific written notice to the members of the charges attributable to their fruit, are unsubstantiated by the credible and reliable evidence of record.

Section 46.32(a) of the Regulations (7 C.F.R. § 46.32(a)) provides that written agreements regarding accounting and settlement between a cooperative and its members are not necessary and that bylaws of a cooperative marketing association may be used in lieu of individual agreements or contracts to determine the methods of accounting and settlement with its grower members. Respondent's members agreed to be bound by Respondent's and Sunkist's bylaws (RX 103, RX 107). It would seem, *ipso facto*, that Respondent's bylaws would then delineate the duties of Respondent to account to its members.

Other sections of the Regulations provide that the bylaws may be used to define the cooperative's duty to account to its members. For example, section 46.2(z) of the Regulations (7 C.F.R. § 46.2(z)), defining "account promptly," states that a cooperative may account to its members on the basis of seasonal pools or other arrangements provided by its regulations or bylaws. Similarly, section 46.2(aa)(11) of the Regulations (7 C.F.R. § 46.2(aa)(11)) defining "full payment promptly," provides that a cooperative may settle with its members on the basis of seasonal pools or other arrangements provided by its regulations or bylaws.

Respondent was not required to itemize the actual expenses incurred because, under section 46.32(b) of the Regulations (7 C.F.R. § 46.32(b)), this requirement is not applicable to cooperatives that determine to pool their growers' produce.

Complainant's position is that Respondent violated its duty to account properly because neither Respondent's bylaws nor any written agreement between Respondent and its members make a specific reference to a contingency fund. The Regulations do not require that the bylaws of a cooperative specifically delineate the charges to be assessed. The Regulations defining "account promptly" (7 C.F.R. § 46.2(z)) and "full payment promptly" (7 C.F.R. § 46.2(aa)) both provide that the cooperatives need only account to their members on the basis of "seasonal pools or other arrangements provided by their regulations or bylaws." Further, section 46.32(a) of the Regulations provides that the bylaws of cooperatives may be used to "determine the methods of accounting and settlement with their grower members." 7 C.F.R. § 46.32(a). Respondent's bylaws clearly provide that charges and expenses of the association would be met by assessments or deductions upon Respondent's members (RX 104 at 14: § 6.2). Further, the bylaws clearly advise Respondent's members that the "method, amount, manner, and time of assessment or deduction shall be fixed and determined from time to time by the board of directors" (RX 104 at 14-15: § 6.2).

Complainant does not contend that Respondent violated its bylaws. Complainant simply argues Respondent's bylaws are inapplicable and Respondent must comply with the Regulations applicable to entities that are not cooperatives. However, the Regulations explicitly provide that the bylaws of cooperatives, such as Respondent, may

be used in lieu of individual agreements or contracts to determine methods of accounting and settlement with grower members.

Further, the various charges and assessments for the reserve account or allocated reserve credits had been assessed by the board of directors. The actions of Respondent's board of directors and the manager were ratified by Respondent's members at the annual meeting each year. Accordingly, Respondent did not fail to account truly and correctly to its members, in violation of the PACA, so long as it followed its bylaws, which it did.

Complainant's claim that Respondent failed to account truly and correctly to its members rests upon the fact that no written document was given to each member expressly advising each member, prior to the season, that the contingency charges would be assessed. However, as a cooperative, a written statement or agreement was not required. (7 C.F.R. § 46.32(a).) Further, a cooperative is free to pool its fruit and account to its members in the manner provided by its bylaws. The evidence shows that Respondent's members were in fact advised of the contingency charge. Mr. Arcure testified that Respondent's members were told that the contingency charge would be assessed and that the assessment of the contingency charge was discussed at the annual meetings of the members and at meetings of the board of directors. Accordingly, Complainant's claim that Respondent's members were not specifically advised as to the contingency charges is in error.

The allegations in paragraphs V and VI of the Complaint, which allege a failure to account truly and correctly to Respondent's growers for $4,439.29 and $14,299.12, respectively, have not been proven by Complainant. These amounts were amended

during the oral hearing to $4,269.16 and 14,028.03, respectively. The claimed violations are premised upon Complainant's conclusion that Respondent must comply with regulations applicable to entities other than cooperative marketing associations. Complainant overlooks the fact that the Regulations only require that Respondent, as a nonprofit cooperative, account to its members, as required by Respondent's bylaws.

Complainant concedes that paragraph VII of the Complaint, relating to juice payments, should be withdrawn.

Paragraphs III and IV of the Complaint allege that Respondent, during the 1994-1995 growing season and the 1995-1996 growing season, misrepresented by word, act, mark, stencil, label, statement or deed, the character or kind of grapefruit that it shipped to its customers in Japan and the United States. Specifically, paragraphs III and IV of the Complaint allege that Respondent packed Melogolds in 7,718 cartons during the 1994-1995 season and 2,904 cartons during the 1995-1996 season and labeled or designated the cartons as containing Oroblancos and that Respondent then sold and shipped the Melogolds as Oroblancos to its customers in Japan and the United States. Complainant alleges in the Complaint that, by reason of the facts alleged in paragraphs III and IV of the Complaint, Respondent had committed violations of section 2(4) and (5) of the PACA. However, on brief, Complainant asserts Respondent's actions were "in breach" of section 2(5) of the PACA, so that the misrepresentation allegation, *sub judice*, is now based solely upon section 2(5) of the PACA (7 U.S.C. § 499b(5)) (Complainant's Brief at 18).

Sunkist is an agricultural cooperative association (RX 107). Respondent is a member of Sunkist, which markets and sells Respondent's produce (Tr. 902-03, 1000-01).

The Tulare County Fruit Exchange, an association of Sunkist growers located in Tulare County, where Respondent has its place of business, acts as an intermediary between growers, such as Respondent and Sunkist (Tr. 1145-46). Sunkist establishes a price for a particular commodity after consulting with the exchanges and packinghouses that have that commodity and that price is presented to the importers in Japan by Sunkist's subsidiary in Tokyo (Tr. 1002-04, 1038). The importers then place their orders, specifying a particular type or brand of fruit, to be loaded on a ship more than a week after the price is established (Tr. 1038). Sometimes, if there is an overwhelming demand, Sunkist asks its growers to deliver as much fruit as possible to Port Hueneme, California, where Sunkist loads the ships (Tr. 1039). Sunkist then allocates the fruit in transit to its customers (Tr. 1039). Orders are conveyed from Sunkist to Respondent and Sunkist's other packinghouses through a computer network called a Kirke system (Tr. 1039-40; CX 21). The orders for hybrid grapefruit specify Oroblanco or Melogold, and such information is on the order (Tr. 1053, 1062; CX 21). Therefore, Respondent's shipments of hybrid grapefruit to Sunkist during the 1994-1995 and 1995-1996 seasons were all in response to orders from Sunkist specifying the variety of hybrid grapefruit, Oroblancos or Melogolds, which was requested by purchasers from Sunkist.

During the 1994-1995 and 1995-1996 growing seasons, Oroblancos and Melogolds had not yet been designated as hybrid grapefruit by USDA or the State of California and the hybrid grapefruit was so new that there were no USDA or State of California regulations specifying how to identify Melogolds and Oroblancos (Tr. 858-70). In January 1997, a State of California regulation became effective, requiring that varieties

of Oroblanco be designated as "Oroblanco" or "Sweetie," requiring that varieties of Melogold be designated as "Melogold," and providing that the common name or identity of Melogolds, Oroblancos, and similar type hybrids, resulting from a cross between a pummelo and a grapefruit, is "hybrid grapefruit" (RX 126).

Although the Oroblanco variety and the Melogold variety were patented by two scientists from the University of California at Riverside in 1981 and 1987, respectively (CX 58), the rights to the fruit were obtained by firms in Israel (Tr. 1006).

Oroblancos and Melogolds, coming from a common source, possess certain similar characteristics (Tr. 35, 38, 78-81, 98-99; CX 58 at 1, 4; RX 100). Melogolds and Oroblancos from immature trees are harder to distinguish than Melogolds and Oroblancos from mature trees (Tr. 1356-58). The differences between Melogolds and Oroblancos become more apparent as the trees mature (Tr. 1359). It is more difficult to distinguish between Melogolds and Oroblancos prior to their maturity (Tr. 1356-62). There are differences between Melogolds and Oroblancos, both before and after they become ripe, as to size, shape, the thickness of the rind, and the color and texture of the rind (Tr. 45-46, 54). There is a deeper yellow color in Melogold than in Oroblanco; Oroblanco is greenish yellow. Melogold is juicier than Oroblanco (Tr. 46). There is a difference in the weight, as well as the taste (Tr. 47-48, 50). Oroblanco is sweeter than Melogold (Tr. 45-48, 54).

Sunkist made an effort in 1992 to develop a market for Oroblancos and Melogolds (Tr. 1005). The first time there was a shipment of pummelos, Melogolds, and Oroblancos of anything more than a pallet quantity, was in 1992 (Tr. 1005-06). With

respect to Oroblancos and Melogolds, Sunkist is in direct competition with Israel (Tr. 1006). Israel has aggressively been marketing its Sweeties, which resemble and are of the same variety as Oroblancos (Tr. 1005-06, 1008). The first appreciable volume of exports of Sweeties from Israel to Japan was during the 1992-1993 season and, since 1993, the volume of exports has grown quickly (Tr. 1006). Israel has an exclusive agent in Japan who pursues that market with considerable determination (Tr. 1006). Sunkist's price policy is to let the price of its fruits fluctuate with the market; whereas Israel has entered into long-term contracts with a Japanese entity, commencing in the 1993-1994 season, for the delivery of specific volumes of specified varieties, together with a fixed price for a fixed output, for a specific time period (Tr. 1018-19). The Israeli delivery price for Sweeties is approximately $7 to $7.50 per carton and was a constant price for the 1994-1995, 1995-1996, and 1996-1997 seasons (Tr. 1019-20).

There is a limited time period when the Japanese market is open for Melogolds and Oroblancos (Tr. 1008). The Israeli fruit, preferred by the Japanese, arrives during the latter part of November and in the month of December (Tr. 1008-09). Melogolds and Oroblancos from the United States must be imported into Japan during part of October and November and the United States fruit must be sold within a short time period (Tr. 1008). The Japanese believe Sweeties are better than Oroblancos and Melogolds from California and prefer the dark-green color and hard texture of Sweeties to California hybrid grapefruit (Tr. 1009). In addition, the Japanese believe that Sweeties are sweeter than Oroblancos (Tr. 1009-10). Oroblancos develop a yellowish

color in November (Tr. 1010). Once the Sweeties arrive in Japan, there is no market for California Oroblancos (Tr. 1010).

Sweeties must be cold treated before they can be sold in Japan (Tr. 1012). During the 1994-1995 season, the Sweeties were cold treated at the warehouse prior to shipment from Israel to Japan. Thus, there was a delayed arrival and Sunkist had a week's advantage and tried to deliver its fruit during that week (Tr. 1012). In subsequent years, Sweeties were cold treated during transportation to Japan. Thus, the period during which Sunkist had a market in Japan for Melogolds and Oroblancos was narrowed further (Tr. 1013).

It is imperative that Oroblancos and Melogolds from California be shipped to Japan because the Japanese market is the principal market for Oroblancos and Melogolds (Tr. 1014). The aggressiveness of Israel in capturing this market has resulted in significant declines in prices for the Sunkist product. Between November 1993 and November 1996, there was an approximate $9.95 decline in price for each carton of Oroblancos and Melogolds (Tr. 1020-21). In addition, the Japanese importers asked for a retroactive decrease in price (Tr. 1022). Once Sweeties get on the market, there is a pronounced decline in the price of Melogolds and Oroblancos sold by Sunkist to Japan (Tr. 1022). For instance, in November of 1993, Sunkist's hybrid grapefruit cartons were selling for $21.93 and by December of 1993, they sold for $9 per carton (Tr. 1022). During the 1994-1995 season in November, Sunkist's hybrid grapefruit cartons were selling for $24 f.o.b. and in December they had decreased to $15.36 per carton (Tr.

1022-23). During the 1995-1996 season, Sunkist's hybrid grapefruit sold in October for $12.89 per carton and in November the price had decreased to $7 per carton (Tr. 1023).

Israel can flood the market with Sweeties, which has an eventual effect upon other citrus products (Tr. 1024). In any event, Israel exports more Sweeties to the Japanese market than the market can easily handle and, once that occurs, the price of the Melogolds and Oroblancos from California dramatically decreases (Tr. 1024-25). After Sweeties stop entering Japan, then the market for California Melogolds and Oroblancos improves (Tr. 1025). However, by that time the California fruit is not comparable to the Sweeties because of the lack of the dark-green color, which the Japanese prefer (Tr. 1009).

The Israelis shipped to Japan approximately 544,944 cartons of Sweeties during the 1993-1994 season, 980,494 cartons of Sweeties during the 1994-1995 season, 1,268,408 cartons of Sweeties during the 1995-1996 season, and 1,369,796 cartons of Sweeties during the 1996-1997 season (Tr. 1007; RX 108). Sunkist, probably the biggest United States exporter of hybrid grapefruit to Japan, shipped approximately 30,000 cartons of hybrid grapefruit in the 1993-1994 season, as compared with 544,944 cartons by the Israelis; 58,000 cartons in the 1994-1995 season, as compared with 980,494 cartons by the Israelis; and 52,212 cartons in the 1995-1996 season, as compared with 1,268,408 cartons by the Israelis (Tr. 1007; RX 108).

The issue involved in this proceeding is whether or not Complainant has proven that Respondent misrepresented 7,718 cartons of Melogolds as Oroblancos during the 1994-1995 season and 2,904 cartons of Melogolds as Oroblancos during the 1995-1996

season, for a total of 10,622 cartons that were misrepresented, in violation of section 2(5) of the PACA (7 U.S.C. § 499b(5)). During the course of the hearing, Complainant amended its Complaint to change the number of cartons packed (Tr. 826; CX 62 at Ex. A, B). The number of cartons Complainant initially claimed was misrepresented is in Exhibits A and B attached to the Complaint (Compl. at Ex. A, B). Exhibit A, attached to the Complaint, alleges that, in the 1994-1995 season, Respondent received, and had available for sale, 11,253 cartons of Melogolds (Compl. at Ex. A). While this number remained constant in the various amendments, Complainant amended the total cartons of Melogolds reported and documented as sold, as well as the "Difference" between cartons of Melogolds received and cartons of Melogolds sold (Tr. 10, 507, 826; Compl. at Ex. A, B; CX 62). At the commencement of the hearing, Complainant announced amendments to the Complaint (Tr. 10). Much, later, Complainant actually presented amended Exhibits A and B, over objection (Tr. 505-06). The ALJ allowed Complainant to amend the Complaint (Tr. 507). The first amended exhibits claimed 3,486 cartons of Melogolds reported and documented as sold, not 3,242 as in the original Exhibit A (Tr. 505-06; CX 62 at Ex. A). Moreover, the claimed "Difference" was revised to 7,767 (Tr. 506; CX 62 at Ex. A).

In addition, Complainant amended the figures concerning Melogolds for the 1995-1996 season (Tr. 505-07; CX 62 at Ex. B). Exhibit B, attached to the Complaint, alleges that, in the 1995-1996 season, Respondent received, and had available for sale, 10,001 cartons of Melogolds, and the total cartons of Melogolds reported and documented as sold as 8,079, leaving a difference of 1,922 (Compl. at Ex. B).

Were it not for Respondent's own records (Tr. 165-72; CX 9A) and the protestation of the county inspector that Melogolds were packed as Oroblancos (Tr. 1389-90, 1395-1403, 1413-14), there would be scant, if any, proof of misrepresentation. The evidence does not include examples of the alleged mislabels, and the number of cartons which were shipped as Oroblancos when they were in fact Melogolds cannot be ascertained. Nevertheless, the record, as a whole, does show that Respondent packed some Melogolds and misrepresented them to be Oroblancos. Sunkist's purchasers did make a distinction when they specified the variety of fruit they were ordering, and Respondent, through the Kirke computer system, did pack in response to the purchasers' orders (Tr. 1039-40). Respondent's designation of Melogolds as Oroblancos was not in accordance with the purchasers' orders and was a misrepresentation of the character or kind of the fruit packed.

Complainant argues that Respondent's misrepresentations of 10,622 cartons of Melogolds as Oroblancos during the 1994-1995 and 1995-1996 seasons were intentional (Complainant's Brief at 18) and that Respondent was well aware of the variety of hybrid grapefruit the Japanese customers were ordering. The orders were conveyed from Sunkist to Respondent through the Kirke computer system and specified Oroblancos or Melogolds. (Complainant's Brief at 36.) Complainant further contends that there was obvious motivation to misrepresent (Complainant's Brief at 18-19, 29); namely, to take advantage of the window of opportunity to supply Oroblancos before the Sweeties arrived in Japan (Complainant's Brief at 29). Thus, Complainant asserts that

Respondent knew, or should have known, of the differences prior to the 1994-1995 and 1995-1996 seasons (Complainant's Brief at 36-37).

The record establishes that, during the 1994-1995 and 1995-1996 seasons, Respondent received Melogolds and Oroblancos from its growers (Tr. 140-43, 188-89, 306; CX 5 at 3, CX 6 at 3, CX 10 at 3-13, CX 11 at 3, CX 21, CX 26-CX 42). Respondent treated these two varieties as the same for the 1994-1995 season (Tr. 1138-40, 1143). There were no USDA or State of California regulations specifying how to identify Melogolds and Oroblancos (Tr. 858-59, 944; RX 126). Because of the similarity in appearance of Melogolds and Oroblancos, it was difficult to distinguish between them (Tr. 61-66, 934-35, 1362-63), and at least some of Respondent's employees were not keenly aware of the differences so as to differentiate between the two (Tr. 1390).

In addition, the evidence concerning the "mislabeling" of cartons from Caliente Farms during the 1995-1996 season shows that Mr. Arcure and the owner of Caliente Farms had agreed the Oroblancos were to be picked before the Melogolds (Tr. 1404). However, the independent contractor picking crew did not skip over the Melogolds to pick Oroblancos after pummelos, as agreed, but picked the Melogolds second because they were the block adjacent to the pummelos and next in line (Tr. 1407-08). During a very hectic time of the season, and because the Oroblancos were supposed to be picked and delivered prior to Melogolds, Mr. Arcure believed the fruit arriving from Caliente Farms were Oroblancos (Tr. 1408-10). After they had been received as Oroblancos, Respondent advised Caliente Farms as to the number of field bins of Oroblancos received, and the owner called Mr. Arcure and told him the crew had picked the

Melogolds second, after the pummelos, instead of the Oroblancos (Tr. 1409-10). Due to the press of business, his double duty as both manager and field man, and the contemporaneous testing, picking, and shipping of large quantities of different varieties of fruit, e.g., pummelos, Oroblancos, Navel Oranges, Melogolds, Satsumas, and other varieties, Mr. Arcure forgot to advise the receiver to change the receiving tag on the fruit received from Caliente Farms (Tr. 1410-14). In addition, Mr. Arcure regarded Melogolds and Oroblancos as the same, since the California Department of Food and Agriculture had not designated Melogolds and Oroblancos as separate varieties (Tr. 1396, 1422).

The evidence supports a finding that Respondent's misrepresentations of Melogolds from Hillcroft Groves and Caliente Farms as Oroblancos were the result of inadvertence, carelessness, or negligence. If Mr. Arcure was intentionally packing Melogolds as Oroblancos, fruit from far more than two growers out of the many growers' fruit would have been packed in "mislabeled" cartons. However, county inspector Milner only found Melogolds from two growers packed in cartons labeled Oroblancos, and the record does not suggest that Respondent misrepresented fruit from any other grove during the 1995-1996 season (Tr. 1395-1422).

Complainant maintains that Respondent did know the difference between Melogolds and Oroblancos and that Respondent intentionally misrepresented Melogolds as Oroblancos (Complainant's Brief at 27-28). This allegation is not supported by the credible evidence. What happened were packing errors on the part of some of Respondent's employees (Tr. 1402-10). Further, the number of cartons of Melogolds

which were actually misrepresented as cartons of Oroblancos has not been clearly established in the record. From Respondent's own books and records (Tr. 258-60, 313-15, 325-30, 357-60; CX 25, CX 42A, CX 43 at 1-2, CX 44A at 3, 6, CX 51), it appears, according to Complainant's calculations (Complainant's Brief at 14-18, 38), that Respondent misrepresented approximately 10,622 cartons of Melogolds as Oroblancos.

Based upon my evaluation of the record as a whole and having given full credibility to Respondent's witnesses, I find that it is more likely Respondent's misrepresentations were the result of negligence, carelessness, or inadvertence.

Complainant argues that issuance of the patents for Oroblanco and Melogold establishes the existence of two kinds of fruit to determine whether the PACA was violated by Respondent by the designation of Melogolds as Oroblancos (Complainant's Brief at 30). However, the granting of the patents is not dispositive as to whether there are two "kinds" of fruit for purposes of determining whether the PACA was violated by the representation of Melogolds as Oroblancos.

The purpose of a patent is to grant to the patentee protection from the asexual reproduction of the particular plant by others (Black's Law Dictionary 1125 (6th Ed. 1990); CX 58 at 2, 5). Complainant has not shown a by preponderance of the evidence that a patent is intended to define variety or "kind" for all purposes; further, the PACA nowhere adopts or incorporates plant patents as the standard for establishing different "kinds."

Therefore, the granting of separate patents for Oroblancos and Melogolds, denominating each fruit as a "variety," does not define "kind" under the PACA. The

granting of the patents merely means the fruits are separate varieties for purposes of the patentee's right to exclude others from asexually producing Oroblancos and Melogolds.

The similarity of Melogolds and Oroblancos is clearly established by the record (Tr. 35, 38, 44-66, 78-81, 98-99, 860-64, 1352-67; CX 58; RX 100, RX 126). Melogolds and Oroblancos are not different species of fruit, but rather, they are the same species and have the same scientific name (Tr. 35-43, 863-70; CX 58; RX 100, RX 126). The two seeds, which were original sources of the seedlings planted and later named as Oroblancos and Melogolds, came from the same piece of fruit (Tr. 35-38; RX 100 at 2-3). Thus, these two varieties of hybrid grapefruit were a single species of sterile, seedless fruit coming from a common source with the same scientific name.

Complainant admits that Respondent's violations could have been the result of gross negligence (Complainant's Brief at 37). The intentional misrepresentations attributable to Respondent by Complainant are inferences and are not supported by the record evidence.

Respondent knew the variety of fruit Sunkist wanted for its purchasers (Tr. 948-50, 1038-40). By packing Melogolds as Oroblancos, Respondent misrepresented its fruit in response to a contractual request. Although Respondent's misrepresentations were the result of mere negligence, carelessness, or inadvertence, Respondent willfully did the prohibited acts.

Turning now to sanctions, the PACA Branch, through auditor, Ms. Joan M. Colson, recommended revocation of Respondent's PACA license (Tr. 666). Ms. Colson indicated that, because the alleged violations were of such serious nature, the PACA

Branch was not recommending a civil penalty (Tr. 670). However, Ms. Colson testified that should a civil penalty be assessed, a civil penalty of $500,000 to $1,000,000 would be appropriate (Tr. 671).

As was explained by Ms. Colson, Complainant did not specifically identify 10,600 cartons (Tr. 677-78, 685-88, 735). In fact, no one was able to testify that certain cartons were shipped at a certain time, or to a certain destination, or on a certain common carrier. Instead Ms. Colson testified: "No, . . . we didn't tag specifically 10,600 cartons. What we did was we calculated how many cartons of Melogolds and Oroblancos were received by [Respondent] over this two-year period and then how many were documented as sold and then the difference between the two on Oroblancos was 10,600" (Tr. 735). Complainant's calculations were not premised upon Respondent's own records as much as those obtained from Sunkist and other sources (Tr. 123-24, 183-212, 225-53, 277-78, 643-44, 1130-31; CX 20-CX 24, CX 47, CX 60; RX 110). Sunkist was the selling agent (Tr. 1000-05) and there were intermediaries, such as the Tulare County Fruit Exchange (Tr. 1145-46), as well as intermediaries in the Japanese market (Tr. 1002-04, 1038).

On brief, Complainant pursues its recommendation that a license revocation is the only appropriate sanction and for reason thereof relies heavily upon the testimony of Ms. Colson, as well as reference to *Potato Sales Co., Inc. v. Department of Agric.*, 92 F.3d 800 (9th Cir. 1996) (Complainant's Brief at 53-55).

Section 8(a) and (e) of the PACA (7 U.S.C. § 499h(a), (e) (Supp. III 1997)) provides that if the Secretary determines a commission merchant, dealer, or broker has

violated section 2 of the PACA (7 U.S.C. § 499b), the Secretary may publish the facts and circumstances of the violation, suspend or revoke the PACA license of the offender, or assess a civil penalty.

USDA's sanction policy is set forth in *In re S.S. Farms Linn County, Inc.* (Decision as to James Joseph Hickey and Shannon Hansen), 50 Agric. Dec. 476, 479 (1991), *aff'd*, 991 F.2d 803, 1993 WL 128889 (9th Cir. 1993) (not to be cited as precedent under 9th Circuit Rule 36-3):

> [T]he sanction in each case will be determined by examining the nature of the violations in relation to the remedial purposes of the regulatory statute involved, along with all relevant circumstances, always giving appropriate weight to the recommendations of the administrative officials charged with the responsibility for achieving the congressional purpose.

The record does not justify the sanction sought by Complainant, namely, revocation, or, in the alternative, the imposition of a civil penalty of $500,000 to $1,000,000.

Complainant's sanction witness, Ms. Colson, indicated that it was the position of Complainant that Respondent's acts were willful, repeated, and flagrant (Tr. 665); that the violations were willful because there was an intentional scheme to misrepresent (Tr. 665); that the violations were repeated because of the large number of transactions involved in the approximately 10,622 cartons of Melogolds misrepresented as Oroblancos (Tr. 666); and that the violations were flagrant because there was false accounting to Respondent's growers, which was repeated because of the large number of transactions (Tr. 666). In addition, Ms. Colson was concerned with the international aspects of this misrepresentation and, since some of the misrepresented cartons were believed to have

been exported, there could be international ramifications as to whether or not foreign importers could rely upon the labeling of produce from the United States (Tr. 667-68).

Ms. Colson relied heavily in her recommendation upon *Potato Sales Co., supra*, which involved the mislabeling and export from the United States to Taiwan of New Zealand apples as Washington State apples (Tr. 666-67, 670, 682-83). Specifically, Ms. Colson testified that "the case here is similar to *Potato Sales [Co.]*, and even worse than *Potato Sales [Co.]*, because we do have the false accounting issue" (Tr. 670).

As pointed out by Respondent, the Judicial Officer has indicated in *In re Magic Valley Potato Shippers, Inc.*, 40 Agric. Dec. 1557, 1570-72 (1981), that while intent is not an element of misrepresentation violations, nevertheless, good faith and the lack of fraudulent intent are mitigating circumstances, which should be taken into account when determining the severity of the penalty (Respondent's Objection to Claimant's [sic] Proposed Findings of Fact at 72-73). Other USDA decisions reinforce the conclusion that revocation of Respondent's PACA license is an unduly harsh sanction not called for in this case. For instance, the Judicial Officer stated in *In re Stemilt Growers, Inc.*, that failure to pay cases routinely draw a sanction of license revocation, whereas, it is not USDA policy to remove from the industry a firm that engages in misrepresentation; rather, it is the policy of USDA to impose a sanction sufficiently severe to deter not only the violator but other potential violators from such conduct in the future, as follows:

> [I]t is the policy of the Department to remove from the industry a firm that fails to pay for produce, notwithstanding the firm's inability to pay because of sudden or unexpected cash-flow problems.
>
> However, it is not the policy of the Department to remove from the industry a firm that engages in misbranding. Rather, it is the policy of the

> Department to impose a sanction sufficiently severe to deter not only the respondent but other potential violators from such conduct in the future. *In re Magic Valley Potato Shippers, Inc.*, 40 Agric. Dec. 1557, 1569-73 (1981), *aff'd per curiam*, 702 F.2d 840 (9th Cir. 1983); *In re Maine Potato Growers, Inc.*, 34 Agric. Dec. 773, 793-99 (1975), *aff'd*, 540 F.2d 518 (1st Cir. 1976).

In re Stemilt Growers, Inc., 49 Agric. Dec. 520, 528 (1990).

Also, in *Limeco, Inc.*, the Judicial Officer held that Limeco, Inc., sold 411 cartons of Mexican limes that it represented to be Florida produce; that Limeco, Inc., made false and misleading statements in connection with the 411 cartons of misrepresented limes; and that Limeco, Inc., maintained documents which incorrectly disclosed the country of origin of the limes. *In re Limeco, Inc.*, 57 Agric. Dec. ___, slip op. at 10-11 (Aug. 18, 1998). Such misrepresentations were held to be a violation of section 2(5) of the PACA for which the administrative law judge imposed a 15-day suspension of Limeco, Inc.'s PACA license and for which the Judicial Officer increased the suspension to 45 days. *In re Limeco, Inc.*, *supra*, slip op. at 37.

The subject case relating to Respondent has a number of mitigating factors. Respondent had not received advice from an official that the produce it was packing was nonconforming prior to shipment of the produce. Respondent made efforts to secure information concerning standards for labeling the fruit, the result being that Respondent was advised that there were no identity standards (Tr. 858-59, 944; RX 126). The misrepresentations were the result of inadvertence, carelessness, or negligence on the part of Respondent, rather than intent to deceive Respondent's customers, and were, at least in part, the result of the similarity between Melogolds and Oroblancos. There were no complaints from either Sunkist or the Japanese purchasers of Respondent's fruit (Tr.

962, 1030-31, 1465-66). Since January 1997, there have been labeling requirements for Melogold and Oroblanco varieties (RX 126) and, with Respondent's long history of PACA compliance (Tr. 19, 874-75), the strong likelihood is that Respondent will continue its observance of the PACA requirements. Under these circumstances, revocation of Respondent's PACA license would not be appropriate.

Moreover, there is no purpose to be served under the PACA by an extended suspension. There have been extensive pleadings, a lengthy transcript, voluminous exhibits, and lengthy briefs relating to this matter. All of these have been carefully considered and are reflected in this Decision and Order. Accordingly, the sanction, which I believe would deter Respondent and others in the perishable agricultural commodities industry from violations of section 2(5) of the PACA (7 U.S.C. § 499b(5)) in the future, is a 30-day suspension of Respondent's PACA license, or, in lieu thereof, a civil penalty of $120,000.

ADDITIONAL CONCLUSIONS BY THE JUDICIAL OFFICER

The Complaint alleges that: (1) Respondent willfully, flagrantly, and repeatedly violated section 2(4) and (5) of the PACA (7 U.S.C. § 499b(4), (5)) during the 1994-1995 and 1995-1996 growing seasons, by misrepresenting 10,622 cartons of Melogolds as Oroblancos and sold and shipped Melogolds as Oroblancos to customers in Japan and the United States (Compl. ¶¶ III, IV, VIII); and (2) Respondent willfully, flagrantly, and repeatedly violated section 2(4) of the PACA (7 U.S.C. § 499b(4)) by failing to truly and correctly account to some of its growers for shipments of Melogolds and Oroblancos in the 1994-1995 and 1995-1996 growing seasons.

The ALJ found that Complainant failed to prove the allegations based upon section 2(4) of the PACA (7 U.S.C. § 499b(4)) (Initial Decision and Order at 38). Therefore, the ALJ dismissed paragraphs V-VII and part of paragraph VIII of the Complaint (Initial Decision and Order at 47-48). Complainant did not appeal the dismissal of the violations of section 2(4) of the PACA alleged in paragraphs V-VII of the Complaint (Complainant's Appeal at 1). Moreover, I infer that Complainant abandons the violations of section 2(4) of the PACA alleged in paragraphs III and IV of the Complaint, as well, since Complainant does not restrict abandonment of the alleged violations of section 2(4) of the PACA to particular paragraphs of the Complaint and mentions and argues only the alleged violations of section 2(5) of the PACA in Complainant's Appeal. Thus, there remains only the matter of the alleged violations of section 2(5) of the PACA in paragraphs III, IV, and VIII of the Complaint.

I find, except with respect to the number of violations of the PACA, that the factual situation of the proceeding, *sub judice*, differs in no material way from the factual situation in *Western Sierra Packers, Inc.*, in which I found that there were violations of sections 2(5) and 9 of the PACA (7 U.S.C. §§ 499b(5), 499i), as alleged in the *Western Sierra Packers, Inc.*, complaint. *In re Western Sierra Packers, Inc.*, 57 Agric. Dec. ___, slip op. at 20 (Sept. 30, 1998). In summary, section 2(4) violations are dismissed from both cases, and, although section 9 was charged and found in *Western Sierra Packers, Inc.*, section 9 was not charged in the proceeding, *sub judice*, which leaves only section 2(5) of the PACA as material to both cases.

As originally enacted, section 2(5) of the PACA required that, in order to prove a violation of section 2(5) of the PACA, the misrepresentation had to have been made for a fraudulent purpose.[3] Section 2(5) of the PACA (7 U.S.C. § 499b(5)) has been amended numerous times,[4] and the requirement that the misrepresentation be shown to have been made for a fraudulent purpose was deleted from section 2(5) of the PACA (7 U.S.C. § 499b(5)) in 1956.[5] The Senate Report and House of Representatives Report accompanying H.R. 5337, the bill that was enacted in 1956 and amended section 2(5) of the PACA to eliminate the fraudulent purpose requirement, describe the reason for deleting the fraudulent purpose requirement, as follows:

> Section 2(5) of the Perishable Agricultural Act—as it would be amended by H.R. 5337—would, by deleting the words "for a fraudulent purpose," dismiss the unwieldy necessity of proving the prevalence of fraud in misbranding or mislabeling in order to declare the existence of an

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[3]Perishable Agricultural Commodities Act, 1930, Pub. L. No. 325, ch. 436, § 2(5), 46 Stat. 532-33, provides:

> Sec. 2. It shall be unlawful in or in connection with any transaction in interstate or foreign commerce—
>
> . . . .
>
> (5) For any commission merchant, dealer, or broker, for a fraudulent purpose, to represent by word, act, or deed that any perishable agricultural commodity received in interstate or foreign commerce was produced in a State or in a country other than the State or country in which such commodity was actually produced[.]

[4]Act of Aug. 20, 1937, Pub. L. No. 328, ch. 719, § 2, 50 Stat. 725, 726; Act of June 29, 1940, Pub. L. No. 680, ch. 456, § 4, 54 Stat. 696; Act of July 30, 1956, Pub. L. No. 842, ch. 786, § 1, 70 Stat. 726; Act of Aug. 10, 1974, Pub. L. No. 93-369, 88 Stat. 423; Act of Oct. 18, 1982, Pub. L. No. 97-352, § 1, 96 Stat. 1667; Perishable Agricultural Commodities Act Amendments of 1995, Pub. L. No. 104-48, § 10, 109 Stat. 430.

[5]Act of July 30, 1956, Pub. L. No. 842, ch. 786, § 1, 70 Stat. 726.

unlawful act; evidence of bona fide misrepresentation relative to grade, quality, etc., would represent an adequate base for the declaration of illegal conduct.

S. Rep. No. 84-2507 at 4 (1956), *reprinted in* 1956 U.S.C.C.A.N. 3699, 3702; H.R. Rep. No. 84-1196 at 3 (1955).

Further, USDA's views regarding the elimination of the words *for a fraudulent purpose* from section 2(5) of the PACA were incorporated into the Senate Report and the House of Representatives Report, as follows:

DEPARTMENTAL VIEWS

Following is the letter from the Department of Agriculture recommending enactment of the bill with certain amendments. The amendments proposed by the Department were adopted.

May 25, 1955.

HON. HAROLD D. COOLEY,
Chairman, Committee on Agriculture,
House of Representatives.

DEAR CONGRESSMAN COOLEY: This is in reply to your letter of April 20, 1955, requesting a report on H.R. 5337, a bill to amend the provisions of the Perishable Agricultural Commodities Act of 1930 relating to practices in the marketing of perishable agricultural commodities.

. . . .

Growers, shippers, and buyers are concerned about the existing extent of misbranding and misrepresentation of grade and origin of fresh fruits and vegetables. Although the proposed amendments to the Perishable Agricultural Commodities Act would not correct all malpractices in this field, they would provide significant help. Effective control of misbranding and misrepresentation of fruits and vegetables is difficult under the present statute because no authority is granted to inspect produce in the possession or control of a licensee to determine if it is misbranded unless the licensee requests or grants permission for such inspection. Also, substantial evidence must be produced that the misbranding was done deliberately with the definite intention of defrauding the buyer in order to prove that a fraudulent purpose is involved. The

> proposed amendments undoubtedly would expedite enforcement of the misbranding provisions of the act and provide for more effective action against licensees who violate these provisions.
>
> . . . .
>
> Sincerely yours,
>
> TRUE D. MORSE,
> *Acting Secretary.*

S. Rep. No. 84-2507 at 5-7 (1956), *reprinted in* 1956 U.S.C.C.A.N. 3699, 3703-04; H.R. Rep. No. 84-1196 at 3-5 (1955).

During congressional hearings on H.R. 5337, held on May 26 and May 27, 1955, G.R. Grange, the Deputy Director of the Fruit and Vegetable Division, Agricultural Marketing Service, USDA, testified that the elimination of the *fraudulent purpose provision* would obviate the need to show that the alleged violator intended to mislead the produce buyer and would enable USDA to prove a misbranding violation, even if the buyer knew of, and did not object to, the misbranding, as follows:

> MR. GRANGE. . . .
>
> I have a rather brief prepared statement on the bill that has the indorsement of the Department of Agriculture, and with your permission I would like to read it.
>
> MR. GRANT. Yes, you may proceed, sir.
>
> MR. GRANGE. . . .
>
> . . . .
>
> One major purpose of the bill is to strengthen the provisions regarding misbranding or misrepresentation of grade and origin of fresh fruits and vegetables. This objective is accomplished by eliminating the necessity to prove fraudulent purpose for such actions and by authorizing the Secretary or his representatives to inspect produce held by licensees to determine if any misbranding or misrepresentation exists. Proving that a

fraudulent purpose is involved in a misbranding case means that substantial evidence must be obtained to show the intent of the person committing the violation. On a practicable basis such evidence is usually exceedingly difficult to obtain because the person involved generally pleads that he acted in good faith and that the misbranding or misrepresentation was unintentional. Also, we have encountered the situation a number of times where the shipper or repacker has misbranded the produce as to grade or origin but claims that he was not defrauding the buyer since the latter knew of, and did not object to, the misbranding.

. . . .

The foregoing statement outlines briefly the Department's recommendations for passage of this legislation and gives its interpretation of some of the major factors which would be involved in carrying out the provisions of these amendments.

That, gentlemen is a brief summary of the Department's viewpoint on these bills. We will be glad to give such further information or to answer such questions as you may have.

. . . .

MR. GRANT. . . .

. . . does not this [bill] in a way preclude legal action until the Department has failed to get the interested parties together?

. . . .

MR. GRANGE. My understanding of the misbranding provisions, referring solely to them, is that misbranding per se would be a violation of the PAC Act.

Of [sic] the moment with the necessity of proving fraudulent purpose we have to contact the second party concerned to determine how it was represented to him, did he buy it at that lower price, and was there actually an action on the part of the person doing the misbranding that would give us grounds to find that a fraudulent purpose was involved.

If it were no longer necessary to obtain evidence concerning the intent of the individual doing this misbranding, in my opinion then it would

> to a large extent remove the necessity of having to dig into the relationship between the two parties concerned.

Marketing of Perishable Agricultural Commodities: Hearings on H.R. 5337 and H.R. 5818 Before the Subcomm. on Domestic Marketing of the House Comm. on Agriculture, 84th Cong., 1st Sess. 6-8, 10 (1955) (statement of G.R. Grange, Deputy Director, Fruit and Vegetable Division, AMS, USDA).

The legislative history applicable to the Act of July 30, 1956, is discussed at great length in *In re Harrisburg Daily Market, Inc.*, as follows:

> Respondents contend that the proscribed act of misrepresenting must be willful or intentional. It is recognized that a licensee making an untrue representation may not possess guilty knowledge of wrongful intent. For example, a false or untrue representation may be made innocently, negligently, knowingly and intentionally or for a fraudulent purpose. Cf. *e.g., Jones v. United States*, 207 F.2d 563, 564 (2d Cir. 1953), *cert. denied*, 347 U.S. 921 (1954); *National Mfg. Co. v. United States*, 210 F.2d 263, 275-76 (8th Cir. 1954), *cert. denied*, 347 U.S. 967 (1954); *United States v. Jerome*, 115 F.Supp. 818, 822 (S.D.N.Y. 1953). See also, *e.g.*, Prosser on Torts § 87 (1941); Black's Law Dictionary (4th ed. 1951). Yet, no qualifications were legislated in section 2(5) with respect to the degree of knowledge or the intent of the commission merchant, dealer, or broker making a misrepresentation otherwise prohibited thereunder. Such omission is especially significant as the Congress, in the enactment of Public Law 842, was directly concerned with the question of the mental element required to constitute a violation of section 2(5). The purpose of the 1956 amendment was, in part, to eliminate the phrase, "for a fraudulent purpose" and, of necessity, the Congress was confronted with the effect of such delegation and the degree of culpability to be required in its stead. In interpreting section 2(5) of the act we are precluded from inserting words, such as "willfully" or "knowingly," which are not in the statute. *United States v. Great Northern Railway Co.*, 343 U.S. 562, 575 (1952); *62 Cases of Jam v. United States*, 340 U.S. 593, 596 (1951). It appears, therefore, that Congress did not intend to so qualify a misrepresentation defined in section 2(5) and that the act of misrepresenting by the means specified therein in connection with the subject matter there described constitutes a violation of such section irrespective of the intent of the licensee to misrepresent or even knowledge that the representation is untrue. . . .

This conclusion is clearly affirmed by examination of the legislative history of the 1956 amendment to section 2(5). Prior to such amendment and the elimination of the phrase "for a fraudulent purpose" it was necessary in order to find a violation of section 2(5) to present substantial evidence "that the misbranding was done deliberately with the definite intention of defrauding the buyer." H.R. Rep. No. 1196, 84th Cong., 1st Sess. 4 (1955). See *e.g., In re Flaten-Meberg*, 14 [Agric. Dec.] 952 (1955). It was the declared purpose, in part, of the amendment in issue to "dismiss the unwieldy necessity of proving the prevalence of fraud in misbranding or mislabeling in order to declare the existence of an unlawful act" and to substitute therefor merely "evidence of bona fide misrepresentations relative to grade, quality, etc.," as an "adequate base for the declaration of illegal conduct." H.R. Rep. No. 1196, *supra*, at p. 3. See also S. Rep. No. 2507, 84th Cong. 2d Sess. 4 (1956). The committees obviously did not use the term "bona fide" in its literal sense. Otherwise, they would be saying that a good faith misrepresentation would be illegal conduct. They evidently used the term in the sense of real, actual, material, or a matter of substance. Cf. *Helvering v. Minnesota Tea Co.*, 296 U.S. 378, 384-85 (1935); *Middle Tennessee Electric Membership Corp. v. State ex rel. Adams*, 246 S.W.2d 958, 959-60 (Tenn. 1952). As thus construed, a "bona fide misrepresentation" consists of an actual representation of a material fact which representation is false.

That all subjective mental elements were removed from section 2(5) of the act is further apparent from the congressional hearings on the then proposed amendment. *Hearings before the Subcommittee on Domestic Marketing of the House Committee on Agriculture*, 84th Cong., 1st Sess. on H.R. 5337 and H.R. 5818 (1955). The principal witness and proponent of the bill so understood the effect and consequences of the change, as did other witnesses at the hearings. *Hearings, supra*, at pp. 10, 22, and 39. In addition, the reintroduction of the requirement of knowledge or intent into section 2(5) was proposed and considered. *Hearings, supra*, at pp. 19-20. It was not adopted. . . .

. . . .

> . . . [C]ulpability does not depend on the licensee's lack of good faith or whether or not the misrepresentations were made intentionally, deliberately, or accidentally.

In re Harrisburg Daily Market, Inc., 20 Agric. Dec. 955, 969-73 (1961), *aff'd per curiam*, 309 F.2d 646 (D.C. Cir. 1962), *cert. denied*, 372 U.S. 976 (1963) (footnotes omitted).

The United States Court of Appeals for the District of Columbia Circuit, in affirming the *Harrisburg* decision, stated, as follows:

> The Perishable Agricultural Commodities Act, 1930, required proof of fraudulent purpose as an element of the misrepresentation violations. 46 Stat. 533 (1930). To achieve stricter enforcement as the legislative history discloses, the act was amended in 1956 to eliminate the need to show the existence of fraudulent purpose. 70 Stat. 726 (1956), 7 U.S.C.A. § 499b(5). See H.R. Rep. No. 1196, 84th Cong., 1st Sess., 3-4; S. Rep. No. 2507, 84th Cong., 2d Sess. 4,6, U.S. Code Cong. & Adm. News 1956, p. 3699. See also, *Goodman v. Benson*, 286 F.2d 896 (7th Cir. 1961); *Eastern Produce Co. v. Benson*, 278 F.2d 606 (3d Cir. 1960).

Harrisburg Daily Market, Inc. v. Freeman, 309 F.2d 646, 647 (D.C. Cir. 1962) (per curiam), *cert. denied*, 372 U.S. 976 (1963).

The legislative history applicable to the Act of July 30, 1956, makes clear that any representation of the subject matter described in section 2(5) of the PACA, which is false, even if the misrepresentation is unintentional or accidental, constitutes a violation of section 2(5) of the PACA (7 U.S.C. § 499b(5)). Proof of a violation of section 2(5) of the PACA (7 U.S.C. § 499b(5)) is not dependent on a showing: (1) that the commission merchant, dealer, or broker defrauded, or intended to defraud, the recipient or buyer of the misrepresented produce; (2) that the commission merchant, dealer, or broker intended to benefit by the misrepresentation; (3) that the commission merchant, dealer,

or broker knew or believed that the recipient or buyer of the produce would rely on the misrepresentation; (4) that the recipient or buyer of the misrepresented produce relied on, or was injured by, the misrepresentation; or (5) that the recipient or buyer of the misrepresented produce was aware of the misrepresented fact.[6] Thus, as a matter of law, proof of a violation of section 2(5) of the PACA does not require, *inter alia*, proof of fraud, intent, fraudulent intent, intent to benefit from fraud, knowledge, guilty knowledge, detrimental reliance, knowledge of detrimental reliance, actual reliance, knowledge of actual reliance, actual injury, or knowledge of actual injury.

The record establishes that Respondent willfully and repeatedly misrepresented, by word or statement, the character or kind of approximately 10,622 cartons of hybrid grapefruit, in violation of section 2(5) of the PACA (7 U.S.C. § 499b(5)).

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[6]*See In re Western Sierra Packers, Inc.*, 57 Agric. Dec. ___, slip op. at 31 (Sept. 30, 1998) (stating that any representation of the subject matter described in 7 U.S.C. § 499b(5)) which is false, even if the misrepresentation is unintentional or accidental, constitutes a violation of 7 U.S.C. § 499b(5)); *In re Magic Valley Potato Shippers, Inc.*, 40 Agric. Dec. 1557, 1564 (1981) (stating that respondent's contention that it did not intend to violate section 2(5) of the PACA is probably true; however, intent to defraud is irrelevant), *aff'd per curiam*, 702 F.2d 840 (9th Cir. 1983); *In re Robert J. Wilkinson*, 36 Agric. Dec. 454, 455-56 (1977) (stating that respondent's contention that he violated section 2(5) of the PACA, but that it was not a knowing violation, is not a defense); *In re Maine Potato Growers, Inc.*, 34 Agric. Dec. 773, 797 (1975) (stating that the record supports respondent's view that its violations of section 2(5) of the PACA were unintentional, but intent is not an element of the violations), *aff'd*, 540 F.2d 518 (1st Cir. 1976); *In re Harrisburg Daily Market, Inc.*, 20 Agric. Dec. 955, 973 (1961) (stating that culpability for a violation of section 2(5) of the PACA does not depend on lack of good faith or whether or not the misrepresentations were made intentionally, deliberately, or accidentally), *aff'd per curiam*, 309 F.2d 646 (D.C. Cir. 1962), *cert. denied*, 372 U.S. 976 (1963).

Complainant raises five issues in Complainant's Appeal. First, Complainant contends:

> There is no question as to the number of cartons unlawfully misrepresented by Respondent, as Respondent's own records show that it misrepresented 10,622 cartons of Melogold as Oroblanco over a two year period.

Complainant's Appeal at 3. Respondent replies that the ALJ was correct that the precise number of misrepresented cartons was not determined and could not be determined from the record (Respondent's Reply at 5).

I disagree with Complainant's contention that Complainant proved that Respondent misrepresented exactly 10,622 cartons of Melogolds as Oroblancos. Complainant's sanction witness, Joan M. Colson, admitted that the specific number of cartons of Melogolds misrepresented as Oroblancos was not specifically observed by her or any other USDA employee. Rather, a method of deduction was used, whereby Complainant determined the number of cartons of Melogolds and Oroblancos Respondent had on hand and used simple arithmetic to determine the number of cartons that were misrepresented. However, Complainant did not actually see any cartons labeled or designated Oroblanco, which contained Melogold (Tr. 676-78, 688). Further, during the 1994-1995 season, Respondent accounted to its growers of Oroblancos and Melogolds by combining all the hybrid grapefruit into one pool (Tr. 258-60, 914; CX 25). Thus, under these circumstances, I have some doubt as to the exact number of cartons of Melogolds and Oroblancos that Respondent had for sale, because the fruit was treated as the same variety with no need to distinguish between the two varieties.

However, Complainant has shown by a preponderance of the evidence that Respondent misrepresented approximately 10,622 cartons of Melogolds as Oroblancos. Under the circumstances in this proceeding, I impose the same sanction against Respondent based on Complainant's proof that Respondent misrepresented approximately 10,622 cartons of Melogolds as Oroblancos, as I would have imposed had Complainant proved that Respondent misrepresented exactly 10,622 cartons of Melogolds as Oroblancos.

Second, Complainant contends that:

> Melogold and Oroblanco are two different "kinds" of fruit, of which Respondent was aware or should have been aware, and misrepresenting the Melogold variety as the Oroblanco variety is a violation of section 2(5) of the PACA.

Complainant's Appeal at 13. Respondent replies that Oroblancos and Melogolds are not different kinds of fruit for inspection purposes; hence, Respondent did not misrepresent Melogolds as Oroblancos (Respondent's Reply at 13).

The ALJ found that Oroblancos and Melogolds were not two different "kinds" of fruit; yet, the ALJ, nonetheless, found that Respondent had violated section 2(5) of the PACA. Complainant argues that the ALJ "appears inconsistent" (Complainant's Appeal at 13) and that the ALJ's "finding that Oroblanco and Melogold are not different 'kinds' of fruit was error." (Complainant's Appeal at 21.)

I agree with Complainant. The record establishes that, despite their similarities, Melogolds and Oroblancos are two different kinds of fruit. The PACA does not define the word "kind," as it is used in section 2(5) of the PACA, and the legislative history

applicable to the Act of August 20, 1937,[7] that amended the PACA to make it unlawful to misrepresent the "kind" of a perishable agricultural commodity, does not explicate legislative intent with respect to the meaning of the word "kind" in section 2(5) of the PACA.

When not defined by the statute, words of a statute are to be given their ordinary or common meaning in the absence of a contrary intent or unless giving the words their ordinary or common meaning would defeat the purpose for which the statute was enacted.[8]

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[7]Act of Aug. 20, 1937, Pub. L. No. 328, ch. 719, 50 Stat. 725.

[8]*See Walters v. Metropolitan Educational Enterprises, Inc.*, 117 S. Ct. 660, 664 (1997) (stating that in the absence of an indication to the contrary, words in a statute are assumed to bear their ordinary, contemporary, common meaning); *Smith v. United States*, 508 U.S. 223, 228 (1993) (stating that when a word is not defined by statute, we normally construe it in accord with its ordinary or natural meaning); *Pioneer Investment Services Co. v. Brunswick Associates Ltd. Partnership*, 507 U.S. 380, 388 (1993) (stating that courts properly assume, absent sufficient indication to the contrary, that Congress intends the words in its enactments to carry their ordinary, contemporary, common meaning); *Diamond v. Diehr*, 450 U.S. 175, 182 (1981) (stating that in cases of statutory construction, we begin with the language of the statute; unless otherwise defined, words will be interpreted as taking their ordinary, contemporary, common meaning); *Perrin v. United States*, 444 U.S. 37, 42 (1979) (stating that a fundamental canon of statutory construction is that, unless otherwise defined, words will be interpreted as taking their ordinary, contemporary, common meaning); *Burns v. Alcala*, 420 U.S. 575, 580-81 (1975) (stating that words used in a statute are to be given their ordinary meaning in the absence of persuasive reasons to the contrary); *Banks v. Chicago Grain Trimmers Ass'n, Inc.*, 390 U.S. 459, 465 (1968) (stating that in the absence of persuasive reasons to the contrary, we attribute to the words of a statute their ordinary meaning); *Crane v. Commissioner*, 331 U.S. 1, 6 (1947) (stating that words of statutes should be interpreted where possible in their ordinary, everyday senses); *United States v. Stewart*, 311 U.S. 60, 63 (1940) (stating that Congress will be presumed to have used a word in its usual and well-settled sense); *City of Lincoln v. Ricketts*, 297 U.S. 373, 376 (1936) (stating that in construing the words of an act of Congress, we seek the legislative intent; we give to the words their natural significance unless that leads to an unreasonable result plainly at variance with the evident purpose of the legislation); *Old Colony R. Co. v. Commissioner*, 284 U.S. 552, 560 (1932) (stating that the legislature must be presumed to use words in

(continued...)

Webster's Collegiate Dictionary defines the word "kind" as "fundamental nature or quality"; "a group united by common traits or interests"; or "a specific or recognized variety" (Webster's Collegiate Dictionary 642 (10th ed. 1997)).[9]

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[8](...continued)
their known and ordinary signification); *De Ganay v. Lederer*, 250 U.S. 376, 381 (1919) (stating that unless the contrary appears, statutory words are presumed to be used in their ordinary and usual sense and with the meaning commonly attributed to them); *Greenleaf v. Goodrich*, 101 U.S. 278, 285 (1879) (stating that the popular or received import of words furnishes the general rule for the interpretation of public laws); *Maillard v. Lawrence*, 16 How. 251, 261 (1853) (stating that the popular or received import of words furnishes the general rule for the interpretation of public laws; and whenever the legislature enacts a law, the just conclusion from such a course must be that the legislators not only themselves comprehended the meaning of the language they have selected, but have chosen it with reference to the known apprehension of those to whom the legislative language is addressed, and for whom it is designed to constitute a rule of conduct, namely, the community at large); *Levy v. McCartee*, 6 Pet. 102, 110 (1832) (stating that the legislature must be presumed to use words in their known and ordinary signification, unless that sense be repelled by the context); *Minor v. The Mechanics' Bank of Alexandria*, 1 Pet. 46, 64 (1828) (stating that the ordinary meaning of the language of a statute must be presumed to be intended, unless it would manifestly defeat the object of the provisions); *In re IBP, inc.*, 57 Agric. Dec. ___, slip op. at 54-55 (July 31, 1998) (stating that when not defined by the statute, words of a statute are to be given their ordinary or common meaning in the absence of a contrary intent or unless giving the words their ordinary or common meaning would defeat the purpose for which the statute was enacted), *appeal docketed*, No. 98-3104 (8th Cir. Aug. 12, 1998). *See also In re The Lubrizol Corp.*, 51 Agric. Dec. 1198, 1205 (1992) (stating that the term *used* is not defined in the Plant Variety Protection Act; therefore, it must be accorded its ordinary, dictionary meaning).

[9]*See also Alex J. Mandl, Inc. v. San Roman*, 170 F.2d 839, 841 (7th Cir. 1948) (stating that the word *kind*, when referring to merchandise, generally means "generic or specific quality or character of the article under consideration" or its "essential or distinguishing quality"); *International Minerals & Chemical Corp. v. Property Appraisal Dep't*, 492 P.2d 1265, 1268 (N.M. Ct. App. 1972) (stating that *kind* means "category" or "class"); *City of St. Louis v. James Braudis Coal Co.*, 137 S.W.2d 668, 670 (Mo. Ct. App. 1940) (stating that *kind* means "class, grade, sort").

The record clearly establishes that, despite their similarities, Melogolds and Oroblancos were recognized by growers and purchasers, during the 1994-1995 and 1995-1996 seasons, as different kinds of fruit. I find that Melogolds and Oroblancos are, and at all times relevant to this proceeding were, different kinds of fruit for purposes of the PACA and that the ALJ erred when she determined that they were not different kinds of fruit.

Third, Complainant contends that:

> ALJ Baker erroneously concluded that Respondent's misrepresentations were unintentional.

Complainant's Appeal at 21. Respondent replies that Respondent did not intentionally misrepresent any commodities (Respondent's Reply at 33-41).

Complainant correctly argues that "intent is not an element of misbranding violations under section 2(5) of the PACA," but incorrectly concludes that the ALJ's finding that Respondent's misrepresentations were unintentional "ignores the substantial evidence of intent in the record." (Complainant's Appeal at 21.) I disagree with Complainant's contention that the ALJ ignored the evidence of intent. The ALJ thoroughly discussed the evidence of intent in the record, but found that the evidence was not sufficient to find that Respondent intentionally violated section 2(5) of the PACA (7 U.S.C. § 499b(5)). Instead, the ALJ found that Respondent's violations of section 2(5) were the result of negligence, mistake, accident, or inadvertence (Initial Decision and Order at 62).

Fourth, Complainant contends that: "Respondent's violations of the PACA were willful, repeated, and flagrant" (Complainant's Appeal at 28). Respondent replies that

the ALJ implicitly and correctly decided that Respondent's violations were not willful, repeated, or flagrant (Respondent's Reply at 41).

Violations of section 2(5) of the PACA do not require willfulness as a element of the offense. However, Complainant is correct that the ALJ failed to make findings as to whether Respondent's violations were willful, repeated, or flagrant.

The record establishes that Respondent willfully and repeatedly misrepresented, by word or statement, the character or kind of approximately 10,622 cartons of hybrid grapefruit, in violation of section 2(5) of the PACA (7 U.S.C. § 499(b)(5)).

Therefore, I agree with Complainant that the ALJ erroneously failed to find Respondent's violations of section 2(5) of the PACA willful (Complainant's Appeal at 28-29). A violation is willful under the Administrative Procedure Act (5 U.S.C. § 558(c)) if a prohibited act is done intentionally, irrespective of evil intent, or done with careless disregard of statutory requirements.[10] Willfulness is reflected by Respondent's

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[10]*See, e.g., Toney v. Glickman*, 101 F.3d 1236, 1241 (8th Cir. 1996); *Potato Sales Co. v. Department of Agric.*, 92 F.3d 800, 805 (9th Cir. 1996); *Cox v. United States Dep't of Agric.*, 925 F.2d 1102, 1105 (8th Cir. 1991), *cert. denied*, 502 U.S. 860 (1991); *Finer Foods Sales Co. v. Block*, 708 F.2d 774, 777-78 (D.C. Cir. 1983); *American Fruit Purveyors, Inc. v. United States*, 630 F.2d 370, 374 (5th Cir. 1980) (per curiam), *cert. denied*, 450 U.S. 997 (1981); *George Steinberg & Son, Inc. v. Butz*, 491 F.2d 988, 994 (2d Cir.), *cert. denied*, 419 U.S. 830 (1974); *Goodman v. Benson*, 286 F.2d 896, 900 (7th Cir. 1961); *Eastern Produce Co. v. Benson*, 278 F.2d 606, 609 (3d Cir. 1960); *In re Western Sierra Packers, Inc.*, 57 Agric. Dec. ___, slip op. at 33 (Sept. 30, 1998); *In re Limeco, Inc.*, 57 Agric. Dec. ___, slip op. at 17 (Aug. 18, 1998); *In re Queen City Farms, Inc.*, 57 Agric. Dec. 813, 827 (1998); *In re Scamcorp, Inc.*, 57 Agric. Dec. 527, 552, (1998); *In re Allred's Produce*, 56 Agric. Dec. 1884, 1905-06 (1997), *appeal docketed*, No. 98-60187 (5th Cir. Apr. 3, 1998); *In re Tolar Farms*, 56 Agric. Dec. 1865, 1879 (1997), *appeal docketed*, No. 98-5456 (11th Cir. Sept. 25, 1998); *In re Kanowitz Fruit & Produce, Co.*, 56 Agric. Dec. 917, 925 (1997), *aff'd*, No. 97-4224, 1998 WL 863340 (2d Cir. Oct. 29, 1998); *In re Five Star Food Distributors, Inc.*, 56 Agric. Dec. 880, 895-96 (1997); *In re Havana Potatoes of New York*

(continued...)

violations of express requirements of the PACA (7 U.S.C. § 499b(5)) and the number of Respondent's violations. The variety of hybrid grapefruit ordered by purchasers from Respondent was specified. Respondent negligently, carelessly, or inadvertently filled orders for Oroblancos by providing Melogolds. Respondent knew, or should have known, that the hybrid grapefruit in question was the Melogold variety and could not lawfully be represented as the Oroblanco variety. For example, in the 1995-1996 season, around November 9, 1995, Mr. Milner, a county inspector, brought to Respondent's attention that Melogolds were in cartons erroneously labeled as Oroblancos (Tr. 1396-97, 1400-01). Respondent's manager and field man, Mr. Arcure, testified that he went to the packinghouse the weekend after county inspector Milner was there, to check the identity of the hybrid grapefruit, but "forgot" to correct the mistake (Tr. 1413-14). Thus, Mr. Arcure, who had experience with Melogolds and Oroblancos and was warned by the

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[10](...continued)
Corp., 55 Agric. Dec. 1234, 1244 (1996), *aff'd*, 136 F.3d 89 (2d Cir. 1997); *In re Andershock Fruitland, Inc.*, 55 Agric. Dec. 1204, 1232-33 (1996), *aff'd*, 151 F.3d 735 (7th Cir. 1998); *In re Hogan Distrib., Inc.*, 55 Agric. Dec. 622, 626 (1996); *In re Moreno Bros.*, 54 Agric. Dec. 1425, 1432 (1995); *In re Granoff's Wholesale Fruit & Produce, Inc.*, 54 Agric. Dec. 1375, 1378 (1995); *In re Midland Banana & Tomato Co.*, 54 Agric. Dec. 1239, 1330 (1995), *aff'd*, 104 F.3d 139 (8th Cir. 1997), *cert. denied sub nom. Heimann v. Department of Agric.*, 118 S. Ct. 372 (1997); *In re National Produce Co.*, 53 Agric. Dec. 1622, 1625 (1994); *In re Samuel S. Napolitano Produce, Inc.*, 52 Agric. Dec. 1607, 1612 (1993). *See also Butz v. Glover Livestock Comm'n Co.*, 411 U.S. 182, 187 n.5 (1973) ("'Wilfully' could refer to either intentional conduct or conduct that was merely careless or negligent."); *United States v. Illinois Central R.R.*, 303 U.S. 239, 242-43 (1938) ("In statutes denouncing offenses involving turpitude, 'willfully' is generally used to mean with evil purpose, criminal intent or the like. But in those denouncing acts not in themselves wrong, the word is often used without any such implication. Our opinion in *United States v. Murdock*, 290 U.S. 389, 394, shows that it often denotes that which is 'intentional, or knowing, or voluntary, as distinguished from accidental,' and that it is employed to characterize 'conduct marked by careless disregard whether or not one has the right so to act.'")

county inspector of probable violations, admitted that he "forgot" to change the labels on the cartons of the hybrid grapefruit that were packed from Caliente Farms and Hillcroft Groves (Tr. 1401, 1409-10, 1413).

Respondent's violations were also repeated. Respondent's violations are repeated because "repeated" means more than one.[11] Respondent misrepresented, by word or statement, the character or kind of approximately 10,622 cartons of hybrid grapefruit. Each misrepresented carton constitutes a separate violation of section 2(5) of the PACA (7 U.S.C. § 499b(5)).[12]

Regarding flagrant, Complainant argues that Respondent's violations are similar to those in *Potato Sales Co.*, *supra*, and therefore are to be found similarly flagrant. However, Complainant's sanction witness, Ms. Joan M. Colson, linked and emphasized Respondent's alleged violations of section 2(4) of the PACA for failure to truly and correctly account, to the found violations of failure to truly and correctly account in *Potato Sales Co.*, *supra*. However, the violations of section 2(4) of the PACA, at issue in this proceeding, are dismissed and are no pertinent part of the sanction inquiry. Thus,

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[11]*See In re Western Sierra Packers, Inc.*, 57 Agric. Dec. ___, slip op. at 35 (Sept. 30, 1998) (stating that respondent's misrepresentations of 2,319 cartons of grapefruit were repeated violations of section 2(5) of the PACA); *In re Limeco, Inc.*, 57 Agric. Dec. ___, slip op. at 18 (Aug. 18, 1998) (holding that respondent's misrepresentations of 411 cartons of limes in 3 shipments, to 3 different customers, on 3 separate occasions, constitute repeated violations of the PACA); *In re Potato Sales Co.*, 54 Agric. Dec. 1382, 1402-04 (1995) (stating that the misrepresentations of the place of origin of 7,554 cartons of apples were repeated violations of the PACA), *aff'd*, 92 F.3d 800 (9th Cir. 1996).

[12]*In re Western Sierra Packers, Inc.*, 57 Agric. Dec.___, slip op. at 35 (Sept. 30, 1998); *In re Limeco, Inc.*, 57 Agric. Dec. ___, slip op. at 35-36 (Aug. 18, 1998); *In re Potato Sales Co.*, 54 Agric. Dec. 1382, 1404 (1995), *aff'd*, 92 F.3d 800 (9th Cir. 1996).

Complainant's emphasis on similarity to *Potato Sales Co.*, *supra*, for violations of section 2(4) of the PACA now militates against *Potato Sales Co.*, *supra*, as the paradigm case that Respondent's violations were flagrant.

Fifth, Complainant contends that the proper sanction is license revocation (Complainant's Appeal at 30). Respondent replies that revocation is not an appropriate sanction. Respondent requests that no sanction be imposed, but states, if a sanction is to be imposed, that it be limited to the 15 days that Respondent closed its business due to incorrect advice from the Office of the Hearing Clerk (Respondent's Reply at 6, 49).

I have carefully examined the circumstances surrounding Respondent's violations of section 2(5) of the PACA, and I do not find that Complainant has made a convincing showing for revocation.

Complainant on appeal still recommends revocation of Respondent's PACA license, even though a major part of Complainant's case was dismissed,[13] and Complainant did not appeal the dismissal. At the hearing, Complainant's sanction witness testified that Respondent's misrepresentations of one kind of fruit for another and failures to fully account were so serious that no civil penalty was recommended and only revocation was appropriate; but, if there had to be a civil penalty imposed as the appropriate remedy, the civil penalty would have to be $500,000 to $1,000,000.

This case is governed by USDA's sanction policy in *In re S.S. Farms Linn County, Inc.* (Decision as to James Joseph Hickey and Shannon Hansen), 50 Agric. Dec. 476, 497

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[13]The ALJ dismissed paragraphs V-VII of the Complaint and the violations of section 2(4) of the PACA alleged in paragraphs III and IV of the Complaint.

(1991), *aff'd*, 991 F.2d 803, 1993 WL 128889 (9th Cir. 1993) (not to be cited as precedent under 9th Circuit Rule 36-3), which provides:

> [T]he sanction in each case will be determined by examining the nature of the violations in relation to the remedial purposes of the regulatory statute involved, along with all relevant circumstances, always giving appropriate weight to the recommendations of the administrative officials charged with the responsibility for achieving the congressional purpose.

In light of this sanction policy, the recommendations of administrative officials charged with the responsibility for achieving the congressional purpose of the PACA are highly relevant to any sanction to be imposed and are entitled to great weight in view of the experience gained by administrative officials during their day-to-day supervision of the regulated industry. *In re S.S. Farms Linn County, Inc., supra*, 50 Agric. Dec. at 497.

However, sanction recommendations of administrative officials are not controlling, and in appropriate circumstances, the sanction imposed may be considerably less, or different, than that recommended by administrative officials.[14] I do not adopt the sanction of revocation recommended by the administrative officials because their sanction recommendation is based, in part, on the allegation that Respondent violated section 2(4) of the PACA (7 U.S.C. § 499b(4)), which allegation was dismissed by the ALJ and not appealed by Complainant.

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[14]*In re Western Sierra Packers, Inc.*, 57 Agric. Dec.___, slip op. at 36 (Sept. 30, 1998); *In re Marilyn Shepherd*, 57 Agric. Dec. 242, 283 (1998); *In re Colonial Produce Enterprises, Inc.*, 57 Agric. Dec. ___, slip op. at 20 (Mar. 30, 1998); *In re C.C. Baird*, 57 Agric. Dec. 127, 176-77 (1998), *appeal dismissed*, No. 98-3296 (8th Cir. Oct. 29, 1998); *In re Scamcorp, Inc.*, 57 Agric. Dec. 527, 573-74 (1998); *In re Allred's Produce*, 56 Agric. Dec. 1884, 1918 (1997), *appeal docketed*, No. 98-60187 (5th Cir. Apr. 3, 1998); *In re Kanowitz Fruit & Produce, Co.*, 56 Agric. Dec. 942, 953 (1997) (Order Denying Pet. for Recons.); *In re William E. Hatcher*, 41 Agric. Dec. 662, 669 (1982); *In re Sol Salins, Inc.*, 37 Agric. Dec. 1699, 1735 (1978); *In re Braxton Worsley*, 33 Agric. Dec. 1547, 1568 (1974).

Further, while Respondent's violations of section 2(5) of the PACA (7 U.S.C. § 499b(5)) were willful in the sense that Respondent exhibited a careless disregard of statutory requirements, I do not find that Respondent engaged in the violations in order to deceive its customers. Rather, the violations appear to have been the result of Respondent's lack of concern for distinguishing between the Oroblanco variety and the Melogold variety at a time when no identity standards had been issued by the State of California (RX 126). Nonetheless, Respondent's violations were willful and repeated, involving approximately 10,622 cartons of hybrid grapefruit, and Respondent's violations risk undermining the confidence foreign importers have in representations relating to produce exported from the United States (Tr. 668-69). However, there is no evidence that Respondent's Japanese customers were not satisfied with Respondent's exported hybrid grapefruit (Tr. 908-11, 1029-32; CX 23 at 3).

Section 8(a) and (e) of the PACA (7 U.S.C. § 499h(a), (e) (Supp. III 1997)) provides that, if the Secretary determines that a commission merchant, dealer, or broker has violated section 2 of the PACA (7 U.S.C. § 499b), the Secretary may publish the facts and circumstances of the violation, suspend or revoke the PACA license of the offender, or assess a civil penalty.

Section 8(e) of the PACA (7 U.S.C. § 499h(e) (Supp. III 1997)) provides that I may assess a civil penalty in lieu of the revocation or suspension of Respondent's PACA license for its violations of section 2(5) of the PACA (7 U.S.C. § 499b(5)). In assessing the amount of the civil penalty, due consideration must be given to the size of the business, the number of employees, and the seriousness, nature, and amount of the

violation. The seriousness, nature, and amount of Respondent's violations of section 2(5) of the PACA (7 U.S.C. § 499b(5)) are discussed in this Decision and Order, *supra*. Further, I find that Respondent operates a large business.

Complainant's sanction analysis estimates Respondent's losses, if Respondent had a revoked license for 2 years, which Complainant explains is the time period required before a licensee whose PACA license has been revoked may re-apply for a license. Complainant's sanction witness, Ms. Joan M. Colson, computed Respondent's probable losses at $2.8 million over a 2-year hiatus, which Complainant and Ms. Colson "realized was an unrealistic figure to request" (Tr. 672; Complainant's Brief at 54).

Thereafter, Ms. Colson bases the computation of Respondent's probable losses on a 90-day suspension, estimating therefrom a probable loss figure of $360,000. Complainant adds $20,000 to the $360,000, because Respondent allegedly failed to account, truly and correctly, to its growers for $20,000. Finally, Complainant adds an "additional sum" for the seriousness of the violations. Simple arithmetic reveals such an "additional sum" to be $120,000 to $620,000, in order to reach the recommended $500,000 to $1,000,000 civil penalty (Tr. 671-72; Complainant's Brief at 54).

Complainant originally sought only revocation and only reluctantly addressed the statutory issue of civil penalties (7 U.S.C. § 499h(e)). In the context of opposing any civil penalty, Complainant uses a 2-year time period, that a revoked licensee must wait to be eligible for a new license, to determine that Respondent would lose $2.8 million over the 2 years. Complainant argues that it "realized" that requesting a $2.8 million civil penalty was unrealistic, but Complainant gave no reasons as to how or why Complainant came to

such a realization. Therefore, Complainant did not address the obvious question raised by the $2.8 million loss figure, to wit, if it is unrealistic to seek a $2.8 million civil penalty equal to revocation, then why is it realistic to cause Respondent virtually the same loss, the same $2.8 million, by revoking Respondent's license? I do not here decide that there are no salient arguments, only that Complainant did not make any.

Complainant thereafter calculates Respondent's losses from a 90-day suspension, but Complainant does not recommend a 90-day suspension. Significantly, Complainant gives no reasons, and no explanation, for choosing a hypothetical 90-day suspension, in lieu of revocation. Despite Complainant's ostensibly random choice of a hypothetical 90-day suspension, I infer that Complainant actually considers a 90-day suspension to be a more realistic sanction than revocation.

Complainant estimates Respondent's losses from the hypothetical 90-day suspension to be $360,000, to which Complainant adds $20,000 allegedly not truly and correctly accounted back to Respondent's growers, and an additional sum for the seriousness of the violations, which totals a civil penalty of $500,000 to $1,000,000, in lieu of a 90-day suspension. Losses of $360,000 seem reasonable for a 90-day period. However, the $20,000 figure is not useful because it is not described as a civil penalty, but is money apparently owed, or at least not paid, to growers by Respondent. Further, the alleged violations of section 2(4) of the PACA formed part of Complainant's theory of the serious violations for which Complainant adds an additional sum of $120,000 to $620,000 to the civil penalty. But, since Complainant does not break it down, there is no

way to know what part Complainant meant the alleged violations of section 2(4) of the PACA to have in computing the civil penalty for serious violations.

Therefore, my analysis of Complainant's original sanction recommendation and sanction witness' testimony is that Complainant unrealistically seeks revocation of Respondent's PACA license, when Complainant's own analysis points to a 90-day suspension. However, since Complainant only proved the violations of section 2(5) of the PACA, I impose only a 30-day suspension of Respondent's PACA license. Complainant estimates that Respondent's losses from a suspension of its PACA license would be approximately $4,000 for each day of suspension. Based upon Complainant's estimates, a $120,000 civil penalty for Respondent's violations of section 2(5) of the PACA (7 U.S.C. § 499b(5)), in lieu of the 30-day suspension of Respondent's PACA license, would be appropriate.

Respondent contends that it "was affirmatively advised by the Hearing Office [on July 6, 1998, that] no appeal had been filed and, therefore, [Respondent] closed its packing house, laid off employees, and suspended operations on July 7, 1998[,] as required by the [Initial Decision and Order]" (Respondent's Reply at 5). Based on this contention, Respondent requests that no sanction be imposed on Respondent or, in the alternative, that the sanction "be limited to the closure incurred by Respondent when it was not timely advised of the appeal by the Complainant" (Respondent's Reply at 5).

The record reveals that Respondent was served with the Initial Decision and Order on June 8, 1998.[15] Section 1.142(c)(4) of the Rules of Practice provides that the

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[15]See Domestic Return Receipt for Article Number P 093 143 38.

administrative law judge's decision does not become effective until 35 days after the date of service of the decision on the respondent, unless there is an appeal to the Judicial Officer, as follows:

> **§ 1.142 Post-hearing procedure.**
>
> . . . .
>
> (c) *Judge's decision.* . . .
>
> . . . .
>
> (4) The Judge's decision shall become effective without further proceedings 35 days after the issuance of the decision, if announced orally at the hearing, or if the decision is in writing, 35 days after the date of service thereof upon the respondent, unless there is an appeal to the Judicial Officer by a party to the proceeding pursuant to § 1.145; *Provided, however,* that no decision shall be final for purposes of judicial review except a final decision of the Judicial Officer upon appeal.

7 C.F.R. § 1.142(c)(4).

Further, the ALJ's Initial Decision and Order states that the Initial Decision will become effective 35 days after service, as follows:

> This Decision and Order shall become final thirty-five (35) days after service thereof upon the parties, unless there is an appeal to the Judicial Officer within thirty (30) days.

Initial Decision and Order at 70.

Thus, had no party appealed, the ALJ's Initial Decision and Order would have become effective on July 13, 1998, and Respondent's PACA license would have been suspended beginning July 13, 1998, not July 7, 1998, as Respondent contends. Under these circumstances, I find no basis for Respondent's belief that it was required to begin

its PACA license suspension on July 7, 1998, pursuant to the Initial Decision and Order issued by the ALJ.

Moreover, the record reveals that Complainant filed a timely appeal on July 1, 1998. Hence, the ALJ's Initial Decision and Order never became effective. Further still, Respondent admits that it received a copy of Complainant's timely-filed appeal on July 10, 1998, three days prior to the date on which the ALJ's Initial Decision and Order would have become effective had no timely appeal been filed (Letter from Steven M. McClean to Office of the Hearing Clerk, filed July 20, 1998).

Finally, Respondent's reliance for its contention that no sanction should be imposed on it because of erroneous advice Respondent received from Ms. LaWuan Waring, Legal Technician, Office of the Hearing Clerk, is misplaced. It is well-settled that individuals are bound by federal statutes and regulations, irrespective of the advice of federal employees.[16] Therefore, even if Respondent was given erroneous advice by Ms. Waring, Respondent was bound by the Rules of Practice.

I infer that Respondent contends that the Secretary of Agriculture is estopped from imposing a sanction against Respondent because of Ms. Waring's statement to Respondent that Complainant had not filed an appeal, as of July 6, 1998. The doctrine of equitable estoppel is not, in itself, either a claim or a defense; rather, it is a means of

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[16]*See FCIC v. Merrill*, 332 U.S. 380, 382-86 (1947); *In re David M. Zimmerman*, 57 Agric. Dec. ___, slip op. at 15, 27 (Nov. 18, 1998); *In re John D. Davenport*, 57 Agric. Dec. 189, 227 (1998), *appeal dismissed*, No. 98-60463 (5th Cir. Sept. 25, 1998); *In re Andersen Dairy, Inc.*, 49 Agric. Dec. 1, 20 (1990); *In re Moore Mktg. Int'l, Inc.*, 47 Agric. Dec. 1472, 1477 (1988); *In re Maquoketa Valley Coop. Creamery*, 27 Agric. Dec. 179, 186 (1968); *In re Leslie E. Donley*, 22 Agric. Dec. 449, 452 (1963).

precluding a litigant from asserting an otherwise available claim or defense against a party who has detrimentally relied on that litigant's conduct.[17] One key principle of equitable estoppel is that the party claiming the theory must demonstrate reliance on the other party's conduct in such a manner as to change his or her position for the worse.[18] Ms. Waring did nothing to lead Respondent to believe that the ALJ's Initial Decision and Order would become effective July 7, 1998, or that Respondent was required to cease business on July 7, 1998.

Further, even if Respondent had acted to its detriment based on Ms. Waring's statements, it is well settled that the government may not be estopped on the same terms as any other litigant.[19] It is only with great reluctance that the doctrine of estoppel is applied against the government, and its application against the government is especially disfavored when it thwarts enforcement of public laws.[20] Equitable estoppel does not generally apply to the government acting in its sovereign capacity,[21] as it was doing in

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[17]*Kennedy v. United States*, 965 F.2d 413, 417 (7th Cir. 1992); *Olsen v. United States*, 952 F.2d 236, 241 (8th Cir. 1991); *ATC Petroleum, Inc. v. Sanders*, 860 F.2d 1104, 1111 (D.C. Cir. 1988); *FDIC v. Roldan Fonseca*, 795 F.2d 1102, 1108 (1st Cir. 1986).

[18]*Heckler v. Community Health Servs.*, 467 U.S. 51, 59 (1984); *Carrillo v. United States*, 5 F.3d 1302, 1306 (9th Cir. 1993); *Kennedy v. United States*, 965 F.2d 413, 418 (7th Cir. 1992).

[19]*Heckler v. Community Health Servs.*, 467 U.S. 51, 60 (1984); *United States Immigration & Naturalization Serv. v. Hibi*, 414 U.S. 5, 8 (1973) (per curiam); *FCIC v. Merrill*, 332 U.S. 380, 383 (1947).

[20]*Muck v. United States*, 3 F.3d 1378, 1382 (10th Cir. 1993); *Emery Mining Corp. v. Secretary of Labor*, 744 F.2d 1411, 1416 (10th Cir. 1984); *United States v. Browning*, 630 F.2d 694, 702 (10th Cir. 1980), *cert. denied*, 451 U.S. 988 (1981).

[21]*United States v. Killough*, 848 F.2d 1523, 1526 (11th Cir. 1988); *Johnson v. Williford*, 682 F.2d 868, 871 (9th Cir. 1982).

this case,[22] and estoppel is only available if the government's wrongful conduct threatens to work a serious injustice, if the public's interest would not be unduly damaged by the imposition of estoppel, and, generally, only if there is proof of affirmative misconduct by the government.[23] Respondent bears a heavy burden when asserting estoppel against the government, and it has fallen far short of demonstrating that the traditional elements of estoppel are present in this case.

Therefore, I find no basis upon which to grant Respondent's request that no sanction be imposed because Respondent closed its packinghouse on July 7, 1998.

Finally, in formulating this sanction, I am relying a great deal on the credibility determinations of the ALJ, because the nature of this case turns on the believability of Respondent's witnesses. The ALJ gave "full credibility to Respondent's witnesses" (Initial Decision and Order at 57). The consistent practice of the Judicial Officer is to

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[22]*See In re M. & H. Produce Co.*, 34 Agric. Dec. 700, 760-61 (1975) (holding that the government acts in its sovereign capacity in disciplinary proceedings under the Perishable Agricultural Commodities Act, as amended), *aff'd*, 549 F.2d 830 (D.C. Cir.) (unpublished), *cert. denied*, 434 U.S. 920 (1977). *Cf. In re David M. Zimmerman*, 57 Agric. Dec. ___, slip op. at 28 (Nov. 18, 1998) (holding that the government acts in its sovereign capacity in disciplinary proceedings under the Animal Welfare Act); *In re Dean Byard* (Decision as to Dean Byard), 56 Agric. Dec. 1543, 1561 (1997) (holding that the government acts in its sovereign capacity in disciplinary proceedings under the Horse Protection Act of 1970, as amended); *In re Big Bear Farm, Inc.*, 55 Agric. Dec. 107, 130 (1996) (holding that the government acts in its sovereign capacity in disciplinary proceedings under the Animal Welfare Act); *In re Norwich Beef Co.*, 38 Agric. Dec. 380, 396-98 (1979) (holding that the government acts in its sovereign capacity in disciplinary proceedings under the Federal Meat Inspection Act), *aff'd*, No. H-79-210 (D. Conn. Feb. 6, 1981), *appeal dismissed*, No. 81-6080 (2d Cir. Jan. 22, 1982);

[23]*City of New York v. Shalala*, 34 F.3d 1161, 1168 (2d Cir. 1994); *United States v. Vanhorn*, 20 F.3d 104, 112 n.19 (4th Cir. 1994); *United States v. Guy*, 978 F.2d 934, 937 (6th Cir. 1992); *Gestuvo v. District Director of INS*, 337 F. Supp. 1093, 1099 (C.D. Cal. 1971).

give great weight to the findings by, and particularly the credibility determinations of, administrative law judges, since they have the opportunity to see and hear witnesses testify.[24] The ALJ explained in great detail, throughout the Initial Decision and Order, her reasons for concluding that Respondent's witnesses' testimony was fully credible. The record supports the ALJ's credibility determinations.

Therefore, based on the record, I find that a 30-day suspension of Respondent's PACA license or, in lieu of the 30-day suspension, the assessment of a $120,000 civil penalty would deter Respondent and others in the perishable agricultural commodities industry from violations of section 2(5) of the PACA (7 U.S.C. § 499b(5)) in the future.

For the foregoing reasons, the following Order should be issued.

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[24]*In re David M. Zimmerman*, 57 Agric. Dec. ___, slip op. at 23-24 (Nov. 18, 1998); *In re IBP, inc.*, 57 Agric. Dec. ___, slip op. at 47 (July 31, 1998), *appeal docketed*, No. 98-3104 (8th Cir. Aug. 12, 1998); *In re JSG Trading Corp.* (Decision as to JSG Trading Corp., Gloria and Tony Enterprises, d/b/a G&T Enterprises, and Anthony Gentile), 57 Agric. Dec. 640, 689 (1998), *appeal docketed*, No. 98-1342 (D.C. Cir. July 24, 1998); *In re Jerry Goetz*, 56 Agric. Dec. 1470, 1510 (1997), *appeal docketed*, No. 98-1155-JTM (D. Kan. 1998); *In re Fred Hodgins*, 56 Agric. Dec. 1242, 1364-65 (1997), *appeal docketed*, No. 97-3899 (6th Cir. Aug. 12, 1997); *In re Saulsbury Enterprises*, 56 Agric. Dec. 82, 89 (1997) (Order Denying Pet. for Recons.); *In re Andershock Fruitland, Inc.*, 55 Agric. Dec. 1204, 1229 (1996), *aff'd*, 151 F.3d 735 (7th Cir. 1998); *In re Floyd Stanley White*, 47 Agric. Dec. 229, 279 (1988), *aff'd per curiam*, 865 F.2d 262, 1988 WL 133292 (6th Cir. 1988); *In re King Meat Packing Co.*, 40 Agric. Dec. 552, 553 (1981); *In re Mr. & Mrs. Richard L. Thornton*, 38 Agric. Dec. 1425, 1426 (1979) (Remand Order); *In re Steve Beech*, 37 Agric. Dec. 869, 871-72 (1978); *In re Unionville Sales Co.*, 38 Agric. Dec. 1207, 1208-09 (1979) (Remand Order); *In re National Beef Packing Co.*, 36 Agric. Dec. 1722, 1736 (1977), *aff'd*, 605 F.2d 1167 (10th Cir. 1979); *In re Edward Whaley*, 35 Agric. Dec. 1519, 1521 (1976); *In re Dr. Joe Davis*, 35 Agric. Dec. 538, 539 (1976); *In re American Commodity Brokers, Inc.*, 32 Agric. Dec. 1765, 1772 (1973); *In re Cardwell Dishmon*, 31 Agric. Dec. 1002, 1004 (1972); *In re Sy B. Gaiber & Co.*, 31 Agric. Dec. 474, 497-98 (1972); *In re Louis Romoff*, 31 Agric. Dec. 158, 172 (1972).

Order

1. Respondent is assessed a civil penalty of $120,000, which shall be paid by certified check or money order, made payable to the "Treasurer of the United States," and forwarded to: James Frazier, United States Department of Agriculture, Agricultural Marketing Service, Fruit and Vegetable Division, PACA Branch, Room 2095 South Building, 1400 Independence Avenue, SW, Washington, D.C. 20250. The certified check or money order shall be received by Mr. Frazier within 65 days after service of this Order on Respondent, and Respondent shall indicate on the certified check or money order that payment is in reference to PACA Docket No. D-96-0532.

2. In the event that the PACA Branch does not receive a certified check or money order in accordance with paragraph 1 of this Order, Respondent's PACA license is suspended for 30 days, and the 30-day suspension shall take effect beginning on the 66th day after service of this Order on Respondent.

Done at Washington, D.C.

February 17, 1999

William G. Jenson

William G. Jenson
Judicial Officer